Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

PETROLEUM HELICOPTERS, INC.,

Petitioner,

v.

MITCHEL BURAS,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 18, 1998

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QUESTION PRESENTED

Did the Louisiana courts contravene the standard of care under the general maritime law applicable to emergency situations when they held a helicopter pilot negligent for injuries sustained in a harder-than-normal emergency landing on an offshore platform on the ground that the pilot should have ditched the aircraft in the Gulf of Mexico?

LIST OF PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

All of the parties to the proceeding in the Court of Appeal for the Fourth Circuit, State of Louisiana, are named in the caption of this case.

In accordance with Rule 29.6 of this Court, the following is a list of non-wholly owned subsidiaries of petitioner Petroleum Helicopters, Inc.:

(1) Transnational Transit, Ltd.;

(2) Asia Aircraft Overseas Philippines, Inc.;

(3) Aeroservicios Ranger, CA;

(4) CA/PHI, LLC;

(5) Siam Aerospace Technology, Ltd.;

(6) Clintondale Aviation, Inc.

Petitioner Petroleum Helicopters, Inc. has no parent company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Petroleum Helicopters, Inc. respectfully petitions for a writ of certiorari to review the judgment in this case of the Louisiana Court of Appeal, Fourth Circuit.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, Fourth Circuit, is reported at 705 So.2d 766, and is reprinted in Appendix A at App. 1-26. The Judgment and Reasons for Judgment of the trial court are not reported, but are reprinted in Appendix B at App. 27-66. The order of the Supreme Court of the State of Louisiana denying the Application for Writ of Certiorari and/or Review has not been reported but is reprinted in Appendix C at App. 67.

JURISDICTION

The opinion of the Louisiana Court of Appeal, Fourth Circuit, was entered on December 17, 1997 (Appendix A). Thereafter, petitioner timely filed an Application for Writ of Certiorari and/or Review with the Louisiana Supreme Court, which Application was denied by that court on March 20, 1998 (Appendix C). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Because this petition raises issues only under the general maritime law, no statutes are involved.

STATEMENT OF THE CASE

I. Facts

On September 20, 1988, a Bell 206L-3 helicopter owned and operated by Petroleum Helicopters, Inc. ("PHI") took off from the Main Pass 151 platform in the Gulf of Mexico. (R. Vol. 3, pp. 35-38.)[1] The helicopter was piloted by George Talley, an experienced, former military pilot. (R. Vol. 4, pp. 151-52, 154.) Also aboard were two Shell Pipeline employees, Owen Barnes and Mitchel Buras. (R. Vol. 3, p. 37.) The helicopter's destination was the South Pass 65-B platform, about five or six miles away. (R. Vol. 3, pp. 36, 38.)

Some time after take-off, although exactly when was disputed at trial, Mr. Talley spotted a small bird passing just under the rotor disc of the helicopter. (R. Vol. 3, p. 40.) Almost instantly after Mr. Talley noticed the bird, it was ingested into the aircraft's turbine engine. The ingestion of the bird, not surprisingly, had an adverse effect on the engine's performance, primarily by restricting air flow through the engine. (R. Vol. 4, p. 161.) Mr. Talley immediately reduced power to prevent the engine from overheating and radioed the PHI dispatcher to inform him of the emergency. (R. Vol. 3, p. 49.)

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[1] References to "R." are to the record filed in the Louisiana Court of Appeal.

Mr. Talley had successfully landed malfunctioning helicopters on numerous past occasions. (R. Vol. 4, pp. 152-153, 155.) In this instance, Mr. Talley relied on his prior experience in assessing the situation and decided to land at the South Pass 65-B platform, which he considered the most suitable landing site under the circumstances. He explained at trial why, at the time, he believed this was the best option:

> "When we first ingested the bird, the engine started to squeal. A high-pitched squealing noise. Which was caused by restricted airflow. I have heard the same thing in Viet Nam with a bullet hole in the air compressor. It was the same thing. The engine wasn't getting enough air and it was sucking and making a real high-pitched whistling noise. That particular aircraft [in Vietnam] I flew for forty miles and landed with no problem * * * . [In this flight] I came down on the power. The engine was stabilized. There was no fluctuation. All pressure and everything was good. The engine was running. The aircraft was responding properly, and I made a precautionary landing at South Pass 65 platform." (R. Vol. 4, pp. 161-62.)

Mr. Talley further explained why he thought landing on the platform was preferable to an immediate water landing: "I was concerned for the safety of my passengers. The last thing I wanted to do was ditch the aircraft in the water and expose them to that. As long as the engine was running, the aircraft was flyable. I didn't want to put them in the water." (R. Vol. 3, p. 56.)

Mr. Talley landed the helicopter safely on platform 65-B, in a landing somewhat harder than normal.

(Appendix B, App. 35-36; Appendix A, App. 4.) The helicopter approached the helideck with a little more forward speed than usual and skidded two or three feet upon impact. (Appendix A, App. 4; R. Vol. 3, 81; R. Vol. 4, 165-66.) The helicopter was not damaged in the landing. (R. Vol. 3, 83; R. Vol. 4, p. 167.) More importantly, Mr. Talley and Mr. Barnes suffered no injuries as a result of the incident. (R. Vol. 3, 82.)

Approximately one year after the incident, however, the remaining passenger, respondent Mitchel Buras, filed this action against PHI in the Louisiana 25th Judicial District Court for the Parish of Plaquemines. Mr. Buras alleged, *inter alia*, that his back had been injured in the landing, that he suffered from severe post-traumatic stress disorder as a result of the incident, and that these physical and psychological injuries had been caused by the negligence of PHI and its pilot.

II. Trial Court Proceedings

A. ***The Trial.*** The case was tried without a jury to Judge William A. Roe in November 1993. The sole claim of negligence at trial was based on the theory that, rather than continuing on to the platform, Mr. Talley should have employed the helicopter's emergency pop-out floats and landed the helicopter in the Gulf of Mexico.

There was conflicting testimony regarding the reasonableness of Mr. Talley's actions. In addition to Mr. Talley, three witnesses testified that the decision to land on the platform was reasonable and appropriate under

the circumstances.[2] In contrast, plaintiff's expert opined that it was not safe for Mr. Talley to have continued flying after the bird ingestion. (R. Vol. 3, 111.)[3]

B. ***The Trial Court's Decision.*** The trial court rendered its decision in November 1994. The court ruled, as an initial matter, that federal general maritime law governed plaintiff's claims. (Appendix B, App. 30.) With regard to the issue of negligence, the court held that PHI is "a common carrier owing a very high degree of care to its passengers." (Appendix B, App. 43.) It concluded that Mr. Talley breached that high standard of care because he "chose a dangerous course of conduct which caused harm to one of his passengers rather than choosing an alternative course of conduct which, in all probability, would

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[2] Mr. Walter Lamon, an expert in helicopter piloting and safety, testified that Mr. Talley's decision to land on the platform was correct and "very prudent," in part because Mr. Talley always had the option of a water landing. (R. Vol. 4, 212-19, 224.) Similarly, Mr. Carl Starkey, a retired FAA aviation safety inspector and a helicopter pilot, testified that Mr. Talley had violated no federal aviation regulations and followed the appropriate procedures throughout the incident. (R. Vol. 4, p. 116-17.) Finally, Mr. Vernon Albert, chief pilot for PHI who had been operating helicopters in the Gulf of Mexico for over twenty-six years at the time of the trial, testified that company policy permitted (but did not require) Mr. Talley to continue to the platform rather than landing the helicopter in the water. (R. Vol. 4, p. 186, 189.)

[3] Plaintiff's expert, Mr. Hynes, testified that Mr. Talley should have landed promptly in the Gulf of Mexico, relying on the emergency pop-out floats. Had he done so, Mr. Hynes opined with perfect hindsight that there "should have been no injury to the occupants and a lot less mental stress." (R. Vol. 3, p. 113, 120-21.)

have avoided injury to his passenger." (Appendix B, App. 44-45.)

Alternatively, the court concluded that, even if the pilot owed his passengers only an ordinary standard of care, his conduct in not "choosing the alternative course of conduct" violated that standard. *Id.* Among other things, the trial court found that the burden of preventing Mr. Buras' injuries was slight, because it was "convinced that a water landing was a viable and readily available alternative to continuing the flight. The water was calm and smooth and, most importantly, Talley himself had made water landings in the past." (Appendix B, App. 39-40.) The court emphasized that the helicopter was "equipped for such a landing," a water landing would have eliminated "the risk of impacting the rig," and it was "much more likely" that the water landing itself would not have caused injury. (Appendix B, App. 41.) Significantly, in describing the standard of care, the court neither mentioned nor applied the federal standard applicable to emergency situations. (Appendix B, App. 36-38.)

Having found PHI liable in negligence, the trial court then proceeded to award Mr. Buras $874,018.55 in damages from PHI, plus interest and costs. (Appendix B, Judgment, App. 27-28, and Reasons for Judgment, App. 60.)

III. Court of Appeal Proceedings

Although the Louisiana Court of Appeal was unanimous in determining that this case was governed by the federal maritime law (Appendix A, App. 4-7), it split two-

to-one in affirming the trial court's judgment, with Judge Plotkin dissenting. The court declined to pass upon the issue of whether PHI was a common or private carrier, but instead upheld the trial court's determination that PHI had violated " 'even an ordinary duty of standard of care owed to its passengers in this case.' " (Appendix A, App. 8, quoting Appendix B, App. 43.) As did the trial court, the Court of Appeal believed that the issue of pilot negligence turned on "what was a suitable precautionary landing: an immediate powered landing on calm seas or a forced landing on a platform 1½ to 4 miles away." (Appendix A, App. 12.) The Court of Appeal upheld, as not being "manifestly erroneous," the trial court's conclusion that the pilot's decision to land on the platform was "not reasonable under the circumstances" on the ground that a water landing would have been less risky (Appendix A, App. 9-11.)

In contrast, the dissenting judge stated that both the majority and the trial court "had misapplied the standard [of care] by focusing almost exclusively on whether it would have been more reasonable for Mr. Talley to have immediately ma[d]e a 'soft landing' in the water rather than continuing to fly to the platform." (Appendix A, App. 22.) Judge Plotkin described the standard of care applicable in this case as reasonable care under the emergency circumstances:

> "The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, provided it is a

> reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in light of subsequent events revealed through hindsight, be shown to have been wrong." (Appendix A, App. 21-22, citations omitted.)

Judge Plotkin stressed that, under the proper standard, the appropriate question is not whether it would have been better if the pilot had done something else, but rather whether what the pilot did was unreasonable, in light of all of the circumstances surrounding the emergency. (Appendix A, App. 22.) He concluded that the answer to the question was "no":

> "Talley carefully considered the two available options, and * * * his choice of options was based on his understanding of the totality of the circumstances, reviewed in light of his training and experience * * * . Neither of the options available to Talley were guaranteed to succeed. His decision to continue flying to the platform rather than make a water landing was based on a conscious decision that the risk of attempting a water landing, with the attendant possibilities of injury to the passengers, outweighed the risk of flying to the platform." (Appendix A, App. 24.)

Judge Plotkin thus found that the evidence as a whole indicated that *either* option would have been reasonable, and that under the proper standard of care, which grants great discretion to a pilot faced with an emergency situation, the decision to continue to the platform was not negligent. (Appendix A, App. 25.)

IV. Louisiana Supreme Court Proceedings

Alleging as its sole assignment of error that the trial court and the Court of Appeal had failed to apply the correct standard of care under maritime law, PHI timely applied to the Louisiana Supreme Court for a Writ of Certiorari and/or Review. The Louisiana Supreme Court denied the application on March 20, 1998 (Appendix C, App. 67).[4]

REASONS FOR GRANTING THE WRIT

The Louisiana courts failed to apply the standard of care for emergency situations established by the general maritime law. Instead, the state courts held PHI liable because the pilot failed to respond to the emergency created by the bird ingestion in the manner in which the courts, in hindsight, determined would have been superior. Because the Louisiana courts did not apply the correct federal standard, the judgment below is in conflict

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[4] After denying PHI's petition for writ of certiorari, the Louisiana Supreme Court on March 24, 1998, denied PHI's motion for a stay pending the filing of a petition for certiorari in this Court. Thereafter, on the same date, plaintiff obtained a court order seizing PHI's terminal in Venice, Louisiana. In order to keep its operations in business, PHI paid the judgment. The fact that the judgment was satisfied does not moot the case because payment was made under judicial compulsion and because PHI will seek repayment in the event that this Court grants certiorari and reverses. See *Cahill v. New York, N.H. & H. R.R.*, 351 U.S. 183, 184 (1956); *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885); Robert L. Stern et al., *Supreme Court Practice* 718 (7th ed. 1993).

with the decisions of this Court from the nineteenth century, as well as more recent decisions from the U.S. Courts of Appeals. Those decisions apply a more lenient standard of care for responding to emergencies. Certiorari should be granted so that this Court may resolve the conflict and re-establish the proper standard to be applied in determining whether a response to an emergency situation was negligent.

A. This Court and the Lower Federal Courts Have Repeatedly Held That a More Lenient Standard of Care Applies to Actions Responding to Emergencies.

This Court has long held that, under the general maritime law, a carrier owes its passengers a duty of "reasonable care" and that this duty of "reasonable care" is defined by the circumstances of the particular case. See, *e.g.*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959) (ocean carrier owes passengers "the duty of exercising reasonable care under the circumstances of each case"); accord *Rainey v. Paquet Cruises Inc.*, 709 F.2d 169, 172 (2d Cir. 1983) (rejecting *per se* high standard of care and holding that ocean carrier owes "reasonable care under the circumstances" to its passengers).

This "reasonable care under the circumstances" standard of general maritime law has long made explicit allowance for operators who must make decisions in emergency situations that have been created through no fault of their own. More than a century ago, this Court ruled that a sailor could not be found at fault for how he

had responded to an emergency created by another ship's negligence: "[T]he judgment of a competent sailor *in extremis* cannot be impugned." *The Oregon*, 158 U.S. 186, 204 (1895). Accord, *The Blue Jacket*, 144 U.S. 371, 392 (1892) ("where one ship has, by wrong manoeuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manoeuvred with perfect skill and presence of mind.") (citation and internal quotes omitted).[5]

More recently, the lower federal courts have repeatedly ruled that a more lenient standard of care governed maritime actions involving responses to emergencies. For instance, the Court of Appeals for the Fifth Circuit has held that a pilot of a vessel may face " 'a situation of sufficient peril and immediacy to require application of a standard of law *different from the standard of ordinary maritime negligence.*' " *Employers' Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 772 (5th Cir. 1989) (emphasis added; quoting *M.P. Howlett, Inc. v. Tug Michael Moran*, 425 F.2d 619, 623 (2d Cir. 1970)), *cert. denied*, 493 U.S. 820 (1989). The Fifth Circuit in *Suwannee River* thus explained that decisions made during an emergency are entitled to deferential review:

> " '[t]he master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to *a wide range of discretion in deciding what to do*, provided it is a

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[5] See also *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 6 (1st Cir. 1990) ("The doctrine of *in extremis* has long been a part of admiralty law.").

> reasonable exercise of nautical knowledge and skill under the circumstances. *It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong.'* " 866 F.2d at 772 (quoting *Esso Standard Oil S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967)) (emphasis added).

The lower federal courts have consistently held that this more lenient standard of care applies in crisis situations, and that courts may not second-guess reasonable judgment calls made by masters of vessels in emergency circumstances. See, *e.g.*, *Afran Transport Co. v. S/S Transcolorado*, 458 F.2d 164, 167 (5th Cir. 1972) (" '[E]rrors in judgment committed by a vessel put in sudden peril through no fault of her own are to be leniently judged.' ") (citation omitted); *Shebby Dredging Co. v. Smith Bros., Inc.*, 469 F. Supp. 1279 (D. Md. 1979) (test of master's conduct in handling sinking ship is not whether "another choice would have been better" but whether his choice "is outside the range of discretion of capable seamen"); *American Zinc Co. v. Foster*, 313 F. Supp. 671, 684 (S.D. Miss. 1970) ("It is well established that the Courts will not second-guess the decisions made by masters of imperiled vessels even if they are subsequently proved wrong.").[6]

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[6] This maritime law rule is quite similar to the "sudden emergency" doctrine in land-based tort law. See generally Restatement (Second) of Torts § 296, cmt. b.

B. The Decision Below Conflicts with the Decisions of This Court and the U.S. Courts of Appeals.

Neither the trial court nor the Court of Appeal majority even asked – much less answered – the relevant question under the applicable standard of care: namely, whether the decision to land on the platform was within the "wide range of discretion" possessed by the pilot on how to respond to the emergency created by the ingestion of a bird into the helicopter's engine.[7] Instead, both the trial court and the Court of Appeal based their rulings on the fact that there allegedly existed a superior *alternative* course of action – an emergency water landing in the Gulf of Mexico. Significantly, however, as Judge Plotkin pointed out in his dissent, a decision made in the face of an emergency is not per se *unreasonable* merely because, with perfect hindsight, one might conclude that an alternative response would have been better. As the dissent further pointed out, "[t]he record evidence in the instant case, taken as a whole, indicates that Talley's decision to continue flying the helicopter to the platform was reasonable under the circumstances." (Appendix A, App. 25.)

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[7] The majority of the Louisiana Court of Appeal did note that "counsel for PHI emphasizes the discretion given to a pilot in an emergency such as this * * *," but it utterly failed to follow up on the point. (Appendix A, p. [10].) Indeed, the court concluded its sentence by stating that "plaintiff's counsel argues that the situation did not become an emergency until Mr. Talley elected to fly after the 'bird strike' had disabled his plane" (*Id.*) Plaintiff's argument is nonsense, because he argues that the pilot should have landed the aircraft in the Gulf of Mexico and only an emergency would have led to such a landing.

As a result, the decision of the Louisiana courts in this case conflicts with the governing federal rule announced in decisions such as *The Oregon* and *Suwannee River*.

Thus, for example, in *The Oregon*, this Court rejected a contention that a lookout on one ship should have used a bell instead of only shouting at another ship that had negligently veered into a collision course:

> "As soon as the lookout became satisfied that the Oregon either had not seen or had mistaken his light, he did what in the excitement of the moment seemed to him best. He hailed her, and continued to shout until just before the collision. It was a case of action *in extremis*, and, while it is possible that a bell might have called the attention of the approaching steamer, it is by no means certain that it would have done so, and whether the lookout acted wisely or not, he evidently acted upon his best judgment; and the judgment of a competent sailor *in extremis* cannot be impugned." 158 U.S. at 204.

Similarly, in *Suwannee River*, the Fifth Circuit held that a ship captain's decision about how to handle a damaged vessel in the face of unexpectedly severe weather was not negligent, even though the vessel ultimately sank and there was some evidence that another course of action might have saved the vessel. 866 F.2d at 771-73. Likewise, in *M.P. Howlett, Inc. v. Tug Michael Moran*, 425 F.2d 619, 622-23 (2d Cir. 1970), the Second Circuit reversed a trial court finding that a tug captain's decision regarding what to do when the barge that he was towing began to take on water was negligent because an alternative course of action would have been more prudent. The court held that a finding of negligence

could not be based solely on hindsight: " 'The tug is not to be held responsible because the master, in an emergency, did not do precisely what, after the event, others may think would have been best.' " *Id.* at 623 (quoting *The Hercules*, 73 F. 255, 258 (2d Cir. 1896)).

In short, the result reached below conflicts with the federal rule on the standard of care for emergency situations because the Louisiana courts focused on whether, in hindsight, a water landing would have been a superior response. The federal rule instead gives the pilot a wide range of discretion in fashioning a response to an emergency and asks only whether in light of that discretion the choice of response to the emergency was reasonable. If the Louisiana courts in this case had employed the correct standard of care, as Judge Plotkin did in his dissent, they would have had to rule that Talley was not negligent because the decision to land on the platform was plainly a reasonable one under the circumstances.

C. The Court Should Grant Review To Resolve the Conflict and To Re-Establish the Applicable Standard of Care for Emergency Situations.

Unfortunately, emergency situations will continue to arise as ships and aircraft continue to ply the seas and the airspace over the seas. The question of whether operators of vessels and aircraft are to be second-guessed in personal injury actions for decisions in responding to emergencies therefore is a recurring one of importance to those operators. If not reviewed by this Court, the decision below will surely encourage other courts to base findings of liability in maritime cases on the claim that

the defendant should have chosen some other option in response to the emergency situation than the option chosen. Such claims will be easy to make, for there is almost always some other course of action that might have been taken in response to the emergency and the plaintiff can almost always argue that this other course would not have injured him (as the option chosen allegedly did).

The decision of the Louisiana Court of Appeals conflicts with this Court's nineteenth century decisions, as well as more recent decisions of the lower federal courts. It is striking that, notwithstanding the dissent, the majority of the Louisiana Court of Appeal failed even to address the federal law on responding to emergencies. This failure, PHI submits, may be in part due to the fact that so much time has passed since this Court last ruled upon the question of what standard of care should govern responses to maritime emergencies. The Court should grant review to resolve the conflict created by the decision below and to re-establish the standard of care that the lower federal and state courts must apply to maritime claims arising out of responses to emergency situations.

CONCLUSION

For the foregoing reasons, Petroleum Helicopters, Inc. respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

MITCHELL BURAS	NO. 95-CA-1629
VERSUS	COURT OF APPEAL
PETROLEUM HELICOPTERS, INC., ET AL	FOURTH CIRCUIT
	STATE OF LOUISIANA

AN APPEAL FROM
THE 25TH JUDICIAL DISTRICT COURT,
PLAQUEMINES PARISH
NO. 33-322, DIVISION "B".
HONORABLE WILLIAM A. ROE, JUDGE

* * *

PATRICIA RIVET MURRAY
JUDGE

* * *

(Court composed of Judge Philip C. Ciaccio, Judge Steven R. Plotkin and Judge Patricia Rivet Murray)

PLOTKIN, J., DISSENTING WITH WRITTEN REASONS

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AFFIRMED

DEC 17 1997

95CA1629.OP2

This case, involving injuries to an offshore worker as a result of a helicopter flight and "hard" landing on an oil platform, was tried to the court, which rendered judgment in favor of the plaintiff, Mitchell Buras in the amount of $874,018.55, and in favor of intervenor, Shell Pipeline Corporation, in the amount of $69,888.02. The judgment is appealed by the defendant, Petroleum Helicopters, Inc. (PHI), who assigns five errors by the trial court. Plaintiff has cross-appealed, arguing that the trial court erred when it applied general maritime rather than Louisiana law to his claim. We affirm.

The underlying facts are not in dispute. At approximately 3:00 p.m. on September 20, 1988, a Bell 206L-3 helicopter, owned by PHI and piloted by its employee, George Talley, took off from an offshore platform in Main Pass Block 151. The helicopter was carrying Mitchell Buras and Owen Barnes, two Shell employees, to another offshore platform at South Pass Block 65-A. Both platforms are located in the Gulf of Mexico, approximately 5-6 miles apart, so that the entire flight was over open water. The weather was clear and the seas were calm. The

helicopter was equipped with flotation equipment that was designed to deploy in the event of a landing in the water. Mr. Buras, sitting in the right rear seat, and Mr. Barnes, sitting in the left front seat, were both wearing life vests as required by PHI regulations; the pilot, Mr. Talley, was not wearing his life vest as required, but it was within his reach. Shortly after taking off Mr. Barnes saw a small bird pass under the rotor disc of the helicopter and into its turbine engine. Although the witnesses disagree how long after take-off this incident happened, all agreed that it was followed immediately by a loud, high-pitched squealing noise, and a rise in the T(urbine)O(out)T(emperature) gauge. The pilot immediately cut power to the engine and notified his base in Venice that he had a problem. He communicated with his dispatcher several times, at one point indicating that the passengers had seen smoke, and finally advising that he did not think that he was going to make it to the next platform and might have to make an emergency landing in the water.

All three of the witnesses, the pilot and his passengers, described the scene in the helicopter as frantic. Mr. Barnes said that he smelled smoke, and he heard Mr. Talley discuss the presence of smoke with the PHI dispatcher. Mr. Talley testified that everything, the bird strike, the engine overheating, the noise and his decision to cut power and continue on to the platform, was happening "in a heartbeat." All three men described a high-pitched, screaming noise coming from the engine. Mr. Barnes stated that the noise was so loud, he could not hear himself. Mr. Buras and Mr. Barnes each testified that he feared for his life. Mr. Barnes was hyperventilating. He

testified that he watched the temperature gauge go higher and higher, which he knew to be dangerous. Mr. Buras was in a state of panic. Both pleaded with the pilot to land the plane immediately. Mr. Barnes heard Mr. Talley tell the PHI dispatcher that he did not think they would make it. Mr. Talley succeeded in reaching the platform at South Pass, and was able to land the helicopter. While the three witnesses differed slightly in describing the landing, all agreed that it was not normal. Mr. Talley, the pilot, testified that the helicopter came into the platform with forward speed at a 45 degree angle rather than from its usual hover. It skidded approximately two feet upon impact with the deck, but bumped less than some normal landings he has experienced. Mr. Barnes testified that he thought the helicopter came into the platform at a high rate of speed. He said that it was at a 45 degree angle when it hit the deck, with the back of its skids hitting first, and skidded about three feet before it stopped. He testified that the engine quit almost as soon as they landed. Similarly, Mr. Buras testified that the helicopter came in very fast, hit on the back skids and slid forward. Mr. Buras alleged that he was thrown forward upon landing, and injured his back as a result. He also alleged that he has suffered severe emotional distress, and that he is disabled as a result of these physical and mental injuries. This litigation followed.

The threshold question presented by this appeal is the determination of what law is applicable to a case involving injury to a helicopter passenger in a "hard" landing on a platform located on the Outer Continental Shelf following damage to the helicopter as a result of a bird "strike" shortly after takeoff over open water. The

trial court, relying on *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485 (1986), determined that the case was governed by the general maritime law.

Plaintiff's counsel argues that the trial court erred when it concluded that *Offshore Logistics* required the application of maritime law to Mr. Buras' claim. Plaintiff distinguishes that case from his because it dealt with a crash that occurred 35 miles offshore with no drilling platforms in the vicinity so that the maritime locality requirement for admiralty jurisdiction was satisfied. Although Mr. Buras concedes that the activity of ferrying passengers from one piece of land[1] to another is a function traditionally performed by waterborne vessels so that there is a maritime nexus, he argues that his claim is not governed by maritime law because it does not involve a maritime locality, the other prerequisite to a finding that a claim is a maritime tort. Mr. Buras contends that the effect of Mr. Talley's negligence occurred not on water, but on the platform when the helicopter made the "hard" landing that caused his injuries, so that his claim is governed by Louisiana law, pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. 1331, *et seq.*, which provides for the application of state law, as surrogate federal law, to accidents and injuries occurring on platforms on the Outer Continental Shelf.

PHI counters that the maritime locality requirement is met in this case because the pilot's decision was made

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[1] The oil platforms located on the Outer Continental Shelf have been recognized as artificial islands for purpose of the Outer Continental Shelf Lands Act. Offshore Logistics, 477 U.S. at 217, 106 S.Ct. at 2491.

and the effect of that decision took place over navigable waters.

In 1972 the Supreme Court addressed the question of whether maritime law would apply to claims arising from the crash of an airplane in navigable waters shortly after take-off. The plane, which was on a charter flight from one point within the continental United States to another, crashed after it struck a flock of seagulls as it was taking off. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493 (1972). As in this case, the parties in Executive Jet disagreed as to where the negligence occurred. The party seeking to apply maritime law argued that the substance and the consummation of the negligence occurred in navigable water, where the plane crashed. The party opposing the application of maritime law argued that the negligence took effect over land, where the plane collided with the birds. The Court noted that accepting either position "gives rise to the problems inherent in applying the strict locality test of admiralty tort jurisdiction in aviation accident cases." *Id.* at 267, 93 S.Ct. at 504. The Court concluded that "[T]he mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters – whatever that means in an aviation context – is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' " *Id.* For this reason, it held that unless the wrong alleged bore a significant relationship to a traditional maritime activity, claims arising from airplane accidents are not cognizable in admiralty. *Id.* Following *Executive Jet*, the application of maritime law to a tort claim has required both a maritime locality and a maritime nexus.

The element in dispute here, unlike that in most cases, is the maritime locality. Although, each side makes a persuasive argument for its position, the rationale of *Executive Jet* compels us to conclude that the trial court correctly determined that Mr. Buras' claim is governed by maritime law. The incident that started the series of events that led to Mr. Buras' claim began over navigable waters while PHI's employee was ferrying his passengers from one artificial island to another, an activity that all parties agree bears a significant relationship to a traditional maritime activity. The negligence of which Mr. Buras complains, the failure of the pilot to put the plane down as soon as it experienced a power loss, occurred over navigable water shortly after take-off, and continued until the helicopter landed. A major component of Mr. Buras' injuries relate to the emotional trauma of that flight. Although it is true that he suffered an additional physical injury when the helicopter made its hard landing, we find that the facts of this case satisfy the maritime locality requirement for the application of maritime law.

Because we find that the trial court's application of maritime law to Mr. Buras' claim was proper, we also find that the trial court did not err when it used after-tax income in calculating Mr. Buras's past and future wage loss.

We now address the errors alleged by PHI. Although PHI agrees that the trial court correctly determined that Mr. Buras' claim is governed by maritime law it contends that the court did not correctly apply that law to this case. Specifically, PHI argues that it was held to a very high standard of care based on the court's erroneous determination that it is a common carrier. PHI also contends

that the trial court failed to consider the emergency nature of the situation in determining that it had breached the standard of care.

Plaintiff counters by arguing that PHI has mischaracterized the trial court's decision as being predicated upon legal error in an effort to avoid the manifest error standard of review that he contends is applicable to this case.

We find that the trial court's determination that PHI breached its duty of care to Mr. Buras is correct. The trial court issued twenty-six pages of detailed, comprehensive reasons for the judgment it rendered. In considering the question of PHI's status as a common or private carrier, the court noted that the evidence on that issue was contradictory. Although the court stated that it considered PHI to be a common carrier, owing a high degree of care to its passengers, it concluded that "PHI has violated even an ordinary duty or standard of care owed to its passengers in this case."[2] In making that determination, the court analyzed the facts of the case in light of PHI's duty to its passengers to operate its helicopters in a reasonably prudent manner and to take all steps necessary for the protection of those passengers. Finding that the harm complained of by Mr. Buras was within the scope of the protection afforded by that duty, the court utilized a "duty-risk" analysis in order to determine if PHI had breached its duty. Applying the four factors of the "duty-risk" analysis to the facts of this case the court concluded that the activity in which PHI was engaged

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[2] Reasons for Judgment, p. 12.

was of great social utility. However, because the likelihood and gravity of harm that may result from improperly conducting that activity also is great, the court reasoned that the burden of prevention, the final factor of the "duty-risk" analysis, was pivotal to the determination of whether PHI had breached its duty to Mr. Buras.[3]

In determining the burden of preventing the forced landing on the platform, the court was called upon to resolve conflicting testimony and to draw inferences from the evidence presented. The court conducted a detailed analysis of the evidence and concluded that a water landing was a reasonable means of preventing this accident, under the circumstances of this case. We review this conclusion in order to determine if it is clearly erroneous. *Maranto v. Goodyear Tire & Rubber Co.*, 94-2603, 94-2615, p. 7 (La. 2/20/95), 650 So.2d 757, 762.

There is no dispute that the helicopter was equipped with flotation devices that were designed to allow it to be landed on the water, and that the weather was clear and the seas calm. There is no dispute that the bird strike created a very serious situation that resulted in immediate overheating of the engine.

Mr. Talley testified that the weather was clear and the sea was calm, but with a "run in ground swell." He explained that this meant there was no wave or wind chop, but that the sea was not "smooth as glass." He also testified that he immediately knew that something had gone wrong. He acknowledged that the plane was not

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[3] Reasons for Judgment, p. 8.

operating normally, and that he considered it an emergency situation. He conceded that the situation was one that required a precautionary landing.

In Mr. Talley's words "The aircraft was airworthy to fly it to a good place to make a precautionary landing." He felt that the South Pass platform was the closest "suitable" spot for such a landing. Mr. Talley testified that he did not land from a hover, as was the usual procedure. Rather, he reduced power to 72% torque in order to keep the TOT in the "green" range so as to avoid burning up the engine, and then applied more power as he approached the platform.

Although Mr. Talley's experience had demonstrated that a helicopter equipped with flotation devices will float upright on calm seas, he considered a water landing to be a last resort because of his fear that someone would be injured getting into the rescue boat. He testified that he always had the option to land in the water if the engine quit. Mr. Talley admitted that he had no way of knowing the extent of the damage caused by the "bird strike." He acknowledged that he knew that he might be forced to land the helicopter in the water before he reached the platform. In fact, at one point, he advised his dispatcher that he did not think they were going to make it.

Mr. Talley testified that he based his decision to continue to South Pass 65 rather than land in the Gulf, at least in part, on his experience in Viet Nam. He described having flown an aircraft that had been shot and was making a high-pitched squealing noise, similar to that

heard after the bird strike, forty miles before he could find a safe landing area.

The experts disagreed as to whether the pilot's decision not to make a immediate water landing was a reasonable one. Mr. Walter Lamon, an expert called by PHI and qualified in the field of helicopter piloting and safety offered his opinion that Mr. Talley did nothing wrong in deciding to continue to the South Pass platform. He suggested that this was the only practical landing area, noting that the pilot always had the option of a water landing while he continued on to the platform. On cross-examination Mr. Lamon admitted that the helicopter was not airworthy from the time it ingested the bird.

Mr. Michael Haynes, an expert called by Mr. Buras and qualified in the field of safe helicopter operations and piloting offered his opinion that the pilot should have made a precautionary landing in the water. Mr. Haynes based this opinion on the fact that a landing in the water would have been a "powered" landing as opposed to a "forced" landing on the platform. Mr. Haynes testified that the PHI manual required that a precautionary landing be made immediately, and that Mr. Talley took a "calculated risk" by continuing to the platform. Finally, Mr. Haynes testified that the noise made by the engine, as described by the witnesses, indicated that there was structural damage to the engine, which could have failed at any time.

The trial court found that "[t]he conclusion to be drawn is that a water landing could have been performed with much more power and more safely than the landing

performed on the platform."[4] The trial court recognized that there were dangers inherent in either of the options available to Mr. Talley. It found, however, that the course chosen by Mr. Talley presented more "unknowns."

While counsel for PHI emphasizes the discretion given to a pilot in an emergency situation such as this, plaintiff's counsel argues that the situation did not become an emergency until Mr. Talley elected to continue to fly after the "bird strike" had disabled his plane.

Because Mr. Talley's gamble paid off we know the result of the course he chose. Although the helicopter did not make a normal landing on the platform, it, fortunately, did not crash and burn as Mr. Buras feared it would. However, the determination of whether Mr. Talley's actions were reasonable under all the circumstances must be made in light of those circumstances as they were presented at the time – not with 20-20 hindsight.

Immediately upon striking the bird the turbine temperature began to rise, air flow was restricted; the engine was not operating properly; the helicopter was not airworthy. This was a serious problem, which all the experts agree required a precautionary landing. The dispute here focuses on what was a suitable precautionary landing: an immediate powered landing on calm seas or a forced landing on a platform 1 1/2 to 4 miles away.

The helicopter was equipped with very expensive flotation equipment designed for emergency landings on the water. In Mr. Talley's experience, a helicopter so

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[4] Reasons for Judgment, p. 9.

equipped will float upright on calm seas. The weather was clear, and the helicopter was equipped with an inflatable raft. There were two nearby platforms from which rescue boats could have been dispatched so that the passengers would not have been in the water for very long before being picked up. Although Mr. Talley was concerned that someone might be hurt in transferring to the rescue boat, that risk under these weather and sea conditions seems minimal.

By contrast, Mr. Talley was forced to reduce power to 72% torque in order to keep the TOT within the "green" range to be able to continue to the platform. However, it was necessary for him to apply more power as he made his approach; this caused the engine temperature to rise, and increased the risk that the engine would fail, perhaps at a critical point. Mr. Talley did not know the extent of the damage to his plane from the bird strike. Although he felt that he had the situation under control, his engine could have quit at any time. Mr. Talley admitted as much when he justified his decision to continue to the platform by stating that he "always had the option of a water landing."

Based on these facts, we cannot say that the trial court was manifestly erroneous when it determined that Mr. Talley's actions were not reasonable under the circumstances. The decision to continue flying, which was a reasonable one when the problem occurred over enemy territory in Viet Nam where there was no viable alternative, was not reasonable under the conditions existing in the Gulf of Mexico on September 20, 1988. The record supports the trial court's decision that PHI breached the standard of reasonable care under the circumstances that

it owed to its passengers when its pilot elected not to make a precautionary landing in the water. We find, therefore, that the first and second errors assigned by PHI are without merit.

In its third assignment of error PHI contends that Mr. Buras failed to carry his burden to show that Mr. Talley's negligence was the cause in fact of his injuries. It also contends that the trial court erred in determining that Mr. Buras was permanently disabled from employment as a result of Mr. Talley's negligence.

PHI suggests that plaintiff has not borne his burden as to causation because he has not shown that he would not have been injured were it not for Mr. Talley's negligence. It argues that the stress and trauma Mr. Buras experienced were related to the bird strike and the engine noise that followed it. Because this trauma is unrelated to Mr. Talley's decision as to where to land, PHI suggests that a water landing would have created even greater potential for developing post-traumatic stress disorder.

Plaintiff counters that the evidence establishes that Mr. Buras was a good worker, who suffered no mental or physical problems immediately preceding the accident, but who began experiencing back and psychological problems thereafter. Plaintiff argues that this evidence creates a presumption that his back and emotional problems were caused by the accident, and that the trial court correctly concluded that PHI had not produced sufficient evidence to rebut that presumption.

The determination of whether a particular accident caused a person's injuries is a question of fact that is

reviewed under the manifest error standard. Maranto, 94-2603, 94-2615 at p. 7, 650 So.2d at 762.

The trial court concluded that a water landing would have been a controlled soft landing. We have reviewed the evidence and found that it supports that conclusion. Based on the evidence, the trial court's determination that Mr. Talley's negligence was a cause in fact of Mr. Buras' emotional and physical injury is supported by the record. PHI's third assignment of error is without merit.

PHI next takes issue with the trial court's conclusion that Mr. Buras' physical and emotional injuries render him completely disabled. PHI argues that Mr. Buras could not be disabled from his back injury because he returned to work after the accident, working for a month during which he did not miss a single day, and another month in which he missed only one week. It also argues that there is absolutely no evidence to establish that Mr. Buras' psychological injury, which it suggests is highly suspect, makes it impossible for him to work.

The evidence establishes that Mr. Buras suffered a fall at a grocery in October of 1986, and that he was out of work until March of 1987 as a result of that accident. However, he testified that the injuries that he suffered in that fall had resolved prior to the "hard" landing on the platform at South Pass. He also testified that he experienced back pain and emotional distress after the landing, and consulted Dr. Alden Baehr, his family physician, for both problems. On November 29, 1988, Dr. Baehr referred Mr. Buras to Dr. Kleinschmidt, an orthopedist.

Dr. Raeburn C. Llewellyn, a neurosurgeon, treated Mr. Buras following his accidents in 1986 and 1988. He

explained that he first saw Mr. Buras on November 3, 1986. At that time diagnostic testing revealed the presence of spondylolisthesis, a congenital abnormality, at the level of L3-4 as well as a bulging of the L3-4 disc. Dr. Llewellyn diagnosed a muscle ligament sprain of the low back, perhaps with damage to the L3-4 disc, and recommended six weeks of out-patient physical therapy and supportive medications. He discharged Mr. Buras to return to work on March 10, 1987.

Dr. Llewellyn did not hear from Mr. Buras again until May 17, 1989, when he returned complaining of low back pain as well as pain radiating into his legs following a helicopter accident. Dr. Llewellyn was concerned that Mr. Buras' complaints had not resolved despite appropriate orthopedic treatment, physical therapy and neuropsychiatric treatment. He felt that diagnostic testing was necessary, but deferred this because of Mr. Buras' psychiatric condition. Because of that condition, the diagnostic testing was not performed until June 26, 1991, when nerve testing of the lower extremities indicated that the L5-S1 nerve was damaged. A myelogram/CAT scan revealed a defect at L3-4 and a bulging at L4-5. Mr. Buras underwent a neurosurgical procedure on June 27, 1991, which involved the removal of the L3-4 disc, to decompress the nerves. Dr. Llewellyn, who continued to treat Mr. Buras after surgery, opined that he is permanently and totally disabled from full, unlimited work, and doubted that he could do even light work so that he could not return to any form of manual labor.

Dr. Mark Juneau, an orthopedic surgeon called by the defense, testified that he found no indication for surgery

when he was treating Mr. Buras after the helicopter accident. However, he acknowledged that he had not seen the reports of the diagnostic tests ordered by Dr. Llewellyn. It is Dr. Juneau's opinion that Mr. Buras has a 30% permanent impairment of his low back as a result of the laminectomy and that he is not a candidate to work in the heavy labor force.

Dr. Candace Cutrone, the psychiatrist who has treated Mr. Buras since 1989, testified that he suffers from post-traumatic stress disorder as a result of the helicopter incident in September 1988. Dr. Cutrone explained that Mr. Buras initially was treated for this condition by Dr. LeMay, her associate, in late 1988. She began treating Mr. Buras after Dr. LeMay's death. It is her opinion, based on testing, that Mr. Buras is of low average intelligence with a limited ability to think abstractly. Because of this his recovery is much more problematic. Mr. Buras has been hospitalized six or seven times since the accident because of an exacerbation of his symptoms. In between hospitalizations he has been treated with medication and supportive intervention. Dr. Cutrone continued to treat Mr. Buras as of the time of trial, and had no immediate plan to discharge him. It is her opinion that he will need some degree of psychiatric treatment indefinitely.

Dr. Cutrone was cross-examined about Mr. Buras' prior history of emotional problems, including a hospital admission for alcohol abuse and his treatment with antidepressive and anti-anxiety medication prior to the helicopter incident. It is her opinion that drinking was not involved in the hospital admissions that followed the helicopter accident. She has diagnosed Mr. Buras as having post-traumatic stress disorder (PTSD). Dr. Cutrone

explained that there were times when Mr. Buras' post-traumatic stress disorder was overlapped by and may have exacerbated a depressive disorder, but that PTSD is a separate psychiatric condition from a depressive disorder. Although Dr. Cutrone felt that Mr. Buras could function in a work environment during those periods when his symptoms were in remission, she had found him to be largely unstable.

Dr. Rennie Culver, who was qualified as an expert in psychiatry, testified on behalf of PHI. He explained that he examined Mr. Buras for approximately one and one-half hours on March 27, 1989, at the request of an employee of Shell Oil. Dr. Culver opined that Mr. Buras was of below-average intelligence, based on his clinical examination. He also testified that, in his opinion, Mr. Buras was exaggerating his psychiatric complaints related to the helicopter accident. Finally, he disagreed with the diagnosis of post-traumatic stress disorder because he felt that the incident described by Mr. Buras would not produce post-traumatic stress. Dr. Culver explained that he would expect the helicopter incident to produce transient or situational anxiety. However, it is his opinion that the diagnosis of PTSD can apply only to people who have had an experience that is greatly outside the range of usual human experience. On cross-examination he admitted that he had no specifics with regard to the helicopter accident except the description provided by Mr. Buras.

Where the testimony of expert witnesses differ, the trier of fact must determine which evidence is the most credible. *Mistich v. Volkswagen of Germany, Inc.*, 95-0939, p.

5 (La. 1/29/96), 666 So.2d 1073, 1077, *reh'g granted, opinion reinstated on reh'g*, 95-0939 (La. 11/25/96), 682 So.2d 239. Resolution of discrepancies in testimony is within the vast discretion of the trier of fact, and such resolutions will not be upset absent manifest error. *Young v. Logue*, 94-0585, p. 38 (La. App. 4 Cir. 5/16/95), 660 So.2d 32, 57, *writs denied*, 95-2575, 95-2585, 95-2597 (La. 12/15/95), 664 So.2d 443-444. Further, this circuit has established that a trier of fact is entitled to place greater weight on the testimony of a treating physician than those of other physicians who have treated the plaintiff only for purposes related to the litigation. *Id.; Pereira v. Louisiana Coca-Cola Bottling Co.*, 620 So.2d 315 (La. App. 4 Cir.), *writ denied*, 629 So.2d 414 (La. 1993).

The evidence of record establishes that Mr. Buras is of very limited intelligence, with an unstable back and severe emotional problems and supports the trial court's determination of disability. Therefore, we cannot say that the conclusion that Mr. Buras is totally and permanently disabled as a result of his back injury and post-traumatic stress disorder is manifestly erroneous.

Finally, PHI contends that the trial court erred when it failed to reduce Mr. Buras' damages, arguing that his pre-existing conditions required such a reduction. It is uncontested that Mr. Buras had suffered a previous back injury that required treatment and emotional problems that required hospitalization prior to this accident. However, he made a full recovery from his back injury in 1986, and was able to perform his job duties without problem until the helicopter accident. Likewise, although he required psychiatric treatment prior to the helicopter incident, Mr. Buras was able to function. In addition, his

treating psychiatrist diagnosed him as suffering from post-traumatic stress disorder, a separate psychiatric condition from the condition that caused him to seek treatment before this accident.

While Mr. Buras' pre-existing conditions probably made him more susceptible to both physical and mental injury than the average person, that does not relieve or reduce PHI's responsibility for the injuries caused by its conduct. *Dean v. Aisole*, 574 So.2d 1248, 1253 (La. 1991). For this reason, we find no merit in PHI's final assignment of error.

The judgment of the trial court is affirmed, with each party to bear its own cost on appeal.

AFFIRMED

MITCHELL BURAS	NO. 95-CA-1629
VERSUS	COURT OF APPEAL
PETROLEUM HELICOPTERS, INC., ET AL	FOURTH CIRCUIT
	STATE OF LOUISIANA

* * *

PLOTKIN, J., DISSENTING WITH WRITTEN REASONS.

Because I believe that the actions of the pilot, George Talley, were reasonable under the emergency circumstances which gave rise to this case, I respectfully dissent.

Talley, a professional licensed pilot, operating a non-defective helicopter in a non-negligent manner was suddenly confronted with an emergency situation when a bird was ingested into the engine.

The duty of a vessel pilot faced with an emergency situation, under maritime law, has been described as follows:

> The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong.

Employers' Insurance v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 772 (5th Cir.1989), quoting *Esso Standard Oil S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir.1967).

Although both the trial court and the majority recognized that the proper standard of care applicable to the pilot in this case was reasonableness under the circumstances, both misapplied the standard by focusing almost exclusively on whether it would have been more reasonable for Mr. Talley to have immediately make a "soft landing" in the water rather than continuing to fly to the platform. Whether another option was more reasonable is not the appropriate question; rather, the issue is whether the option chosen, in light of all the circumstances surrounding the emergency, was reasonable.

The majority's error is evidenced by the fact that a large portion of the analysis on this issue is focused on a discussion of whether the helicopter was properly equipped for a water landing, and whether Talley had experience making water landings. Neither of those issues has any bearing on whether the decision Talley did make – i.e., to fly to the platform – was reasonable under all the circumstances. The facts that the helicopter was equipped with "expensive flotation equipment" and that Talley had make previous successful water landings are relevant only to the extent that the presence of another option – i.e., the "soft" water landing – is one of many different circumstances to be considered.

Concerning the only relevant issue – whether Talley's decision to continue flying to the platform was reasonable, the record evidence indicates that Talley had previously flown a helicopter with a similar malfunction for

approximately 40 miles. Moreover, at least one expert agreed with Talley's estimate that the platform was the "only practical landing area" available, especially in light of the fact that Talley could have changed his mind at any time and decided to make a water landing. Moreover, the fact that another expert testified that Talley took a "calculated risk" in flying to the platform is not conclusive since other evidence indicated that making a water landing would also have been a "calculated risk," given the uncertainties attendant to that option, even on a calm sea.

In finding that the ship's captain did not violate the above-quoted standard of care in *Employers' Insurance*, 866 F.2d 752, the court stated as follows:

> First, there is ample evidence that Captain Kanellos carefully considered his options (none of which could be guaranteed to succeed) and made a conscious decision that the risk of dragging anchor, running aground, and spilling the vessel's hazardous cargo outweighed the risk of attempting to maneuver the vessel away from the breakwater. Second, the experts who testified at trial did not agree on one prudent course of action. Finally, at least one expert agreed with Captain Kanellos that remaining at anchor could have been dangerous. The district court found that the expert testimony established, at most, that another course of action might have been successful and that this was not enough to establish that the captain's actions had been unreasonable under the circumstances. We agree. "The standard of judging the exercise of prudent seamanship here was tempered by the requirement for decision under very difficult,

> abnormal circumstances and the error, if there was error, was not negligence."

Id. at 772, quoting *M.P. Howlett Inc. v. Tug Michael Moran*, 425 F.2d 619, 623 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970).

The evidence in the instant case leads me to similar conclusions. First, the evidence establishes that Talley carefully considered the two available options, and that his choice of options was based on his understanding of the totality of the circumstances, reviewed in light of his training and experience. Certainly, the trial court's finding that Talley's decision was based on a greater concern for himself and for his employers' property than for the safety of his passengers is not supported by the record. Neither of the options available to Talley were guaranteed to succeed. His decision to continue flying to the platform rather than make a water landing was based on a conscious decision that the risk of attempting a water landing, with the attendant possibilities of injury to the passengers, outweighed the risk of flying to the platform.

Moreover, as the majority notes, the experts testifying at trial expressed different opinions on the more prudent course of action; at least one of the experts agreed with Talley that making a water landing would have been even more dangerous than flying to the platform. The other expert testimony established, at most, that the other option might have been more successful. That testimony is simply insufficient to establish that Talley's choice was not reasonable under the circumstances. Like the captain in *Employers' Insurance*, 866 F.2d 752, Talley considered all the options and made a decision in the midst of "very difficult, abnormal circumstances";

"the error, if there was error, was not negligence." *Id.* at 772.

I see the standard of care to be applied here as roughly analogous to the "error of judgment" rule used in legal and medical malpractice cases to determine negligence. Under the "error of judgment" rule, a legal or medical professional who follows applicable recognized professional standards in recommending a particular course of care cannot be held liable simply because it is later discovered that another decision would have been better. Pilots, like legal and medical professionals, are required to satisfy specialized training and licensing requirements. Like a lawyer or doctor, a pilot who makes a choice between two reasonable courses of action, so long as he reasonably exercises current standards of nautical knowledge and skill under the circumstances, may not be held liable for failing to take the other reasonable course.

The record evidence in the instant case, taken as a whole, indicates that Talley's decision to continue flying the helicopter to the platform was reasonable under the circumstances. Of course, the evidence also indicates that making a water landing would have been reasonable under the circumstances. Talley simply made a choice between two reasonable alternatives. Under the applicable standard of care, which allows a pilot in Talley's situation great discretion, neither Talley nor PHI was guilty of negligence.

I question the role of the experts concerning the determination of ultimate facts in the instant case. This case does not involve allegations that the defendant

breached a statute or violated a duty of care; negligence was not an issue. In fact, the allegations in this case raise issues roughly analogous to "sudden emergency" doctrine issues. *See Marigny v. Allstate Insurance Co.*, 95-0952 (La. App. 4 Cir. 1/31/96), 667 So.2d 1229, *writ denied*, 96-0693 (La. 4/16/96), 672 So. 2d 910. As I have said repeatedly, the only proper question was whether the choice made by the pilot was reasonable under the circumstances. Nevertheless, the trial court made a decision, in a bench trial, based on his evaluation of the relative merits of the competing expert testimony concerning an issue which was actually irrelevant to the real question presented by this appeal. The trial court's decision was obviously based on his conclusion that the plaintiff's experts' opinion that a water landing was a better option was correct. The majority affirms, based on the manifest error standard. Although expert testimony is obviously helpful in evaluating the reasonableness of the pilot's actions in this case, the trial court's decision to credit the testimony of one set of experts over the testimony of the other, it seems to me, is not entitled to affirmation simply because the majority finds no manifest error. A layman is just as qualified as the experts to determine whether the pilot's actions were reasonable in the instant case. The trial court's decision was based on consideration of improper issues. I believe that the majority's deference to the trial court's decision was unwarranted under the unique circumstances of this case.

Accordingly, I would reverse the trial court judgment holding PHI liable for Buras' injuries and vacate the damage award.

APPENDIX B

TWENTY FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NUMBER: 33-322 DIVISION "B"

MITCHELL BURAS

versus

PETROLEUM HELICOPTERS, INC., and
BELL HELICOPTER TEXTRON, INC.

FILED: **OCT 18 1994** /s/ Candace D Dufrene
DEPUTY CLERK

JUDGMENT

This matter came on for trial on the 22nd and 23rd days of November, 1993.

PRESENT: PHILLIP F. COSSICH, JR., MICHAEL ST. MARTIN, and CAROLYN McNABB for the Plaintiff, Mitchell Buras;

KENNETH H. LABORDE and LEO R. McALOON, III., for the Defendant, Petroleum Helicopters, Inc.;

When, after hearing the evidence, the stipulations and argument of counsel, the Court considers the law and the evidence to be in favor of the Plaintiff, for the reasons assigned this date in writing;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Plaintiff, Mitchell Buras, and against the Defendants, Petroleum Helicopters, Inc., in the sum of EIGHT HUNDRED SEVENTY-

FOUR THOUSAND EIGHTEEN AND 55/100 ($874,018.55) DOLLARS, which is itemized as follows:

(1)	General Damages:	$300,000.00
(2)	Loss of Future Wages:	339,074.00
(3)	Future Medical Expenses:	22,000.00
(4)	Past Medical Expenses:	72,894.55
(5)	Loss of Past Wages:	140,050.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Intervenor, Shell Pipeline Corporation, and against the Plaintiff, Mitchell Buras, in the sum of SIXTY-NINE THOUSAND EIGHT HUNDRED EIGHTY-EIGHT AND 02/100 ($69,888.02) DOLLARS, plus legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are ordered to pay all costs of these proceedings, including expert witness fees, plus judicial interest from the date of judgment on the following elements of damages awarded herein:

(1)	Future Lost Income:	$339,074.00
(2)	Future Medical Expenses:	22,000.00
(3)	Future General Damages:	200,000.00

and judicial interest from the date of injury, September 20, 1988, until paid on the remaining damages awarded herein.

JUDGMENT READ, RENDERED, AND SIGNED at Pointe-a-la-Hache, Louisiana, this 18th day of October, 1994.

/s/ William A. Roe
JUDGE

TWENTY FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NUMBER: 33-322 DIVISION "B"

MITCHELL BURAS

versus

PETROLEUM HELICOPTERS, INC., and
BELL HELICOPTER TEXTRON, INC.

FILED: **OCT 18 1994** /s/ Candace D Dufrene
DEPUTY CLERK

REASONS FOR JUDGMENT

In this personal injury suit arising out of injuries allegedly sustained by the Plaintiff during a forced landing of a helicopter, the parties argue vehemently about the standard of proof to apply in a determination of the Defendant's liability or not. The Plaintiff would have this Court find that the owner of the helicopter, Petroleum Helicopters, is a "common carrier" and, thus, are held to a very high degree of care, while Petroleum Helicopters counters that they, as a private carrier, can only be found at fault based on a more stringent standard.

What is established by the evidence in this matter is that the Plaintiff, an employee of Shell Pipe Line Corporation, was a passenger in a helicopter owned and operated by Petroleum Helicopters; that the chopper ingested a bird soon after takeoff from a rig; that the chopper continued on and eventually made a forced landing on the rig that was the destination of the Plaintiff; and that the Plaintiff was injured, both physically and psychologically

as a result of this forced landing. What is in dispute is whether the pilot's decision not to put the chopper down in the Gulf of Mexico and, instead, continuing to the next rig violated whatever standard or degree of care which may have been due the Plaintiff.

As such, the proper determination of the liability or not of Petroleum Helicopters is to conduct a duty-risk analysis of the factual situation within the context of, and upon a determination of the duty which was owed to the Plaintiff by the Defendants. Exactly what duty was owed this Plaintiff by this Defendant is the essence of the determination of liability in this matter.

While the respective parties argue whether this is a claim under the general maritime law, the substantive law of negligence in Louisiana, or otherwise, the issue is well settled. The United States Supreme Court dealt with the issue of a passenger being ferried to an offshore rig in *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). That court determined that a helicopter being used to ferry passengers from the land to a rig is engaged in a function traditionally performed by waterborne vessels and a claim brought as a result of such activity is governed by the general maritime law.

While this state may properly supplement the general maritime law with its own remedies, such as strict liability under La.C.C. art. 2317, no such theory of recovery was proven or argued by the Plaintiff in this litigation. See *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634

(La.1992). Thus, this Court is obligated to apply the general maritime law to this Plaintiff's claim.[1]

Were the Plaintiff to be a seaman, then his burden of proof would be "featherlight" and the "slightest negligence" on the part of the Defendant would be sufficient to impose liability under the Jones Act. *Butler v. Zapata Haynie Corp.*, 92-71 (La.App.3 Cir. 2/23/94), 633 So.2d 1274. However, because the Plaintiff was merely a passenger on board the helicopter and not a seaman, the standard is different.

In matters involving vessels, the shipowner owes the duty of exercising reasonable care toward those aboard the vessel who are not members of the crew. *Gaston v. G & D Marine Services, Inc.*, 93-CA-0182 (La.App.4 Cir. 4/4/94) 631 So.2d 547. The situation whereby a passenger in a helicopter has been injured, and the legal standard to apply, has been dealt with on numerous occasions. In *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La.App.3 Cir.1989), the court found, at 1277:

> "[T]here is no implied warranty of seaworthiness extended to passengers. . . . Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care. . . . Merely because an accident occurs, however, a carrier does not become liable to a

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[1] The Plaintiff has argued that this matter is not governed by the general maritime law, rather, it is a matter to which the general tort law of this state should apply. Citing a recent decision of a Louisiana district court, they urge that the helicopter transportation of non-maritime workers to stationary rigs is not maritime in nature. This argument is rejected. The precedent and rationale of the *Tallentire* decision is clear.

> passenger. . . . A passenger may recover personal injury damages only if he proves the fault or negligence of a carrier." (citations omitted)

Of course, the *Duhon* decision presupposes the status of Petroleum Helicopters as a common carrier and does not discuss the issue as if it were contested. However, the argument of common carrier-private carrier status begs the question. The Court has analyzed the evidence and relevant law together in its determination of the liability or not of PHI and has made the findings set forth hereinbelow.

There were there witnesses to this incident. In addition to the Plaintiff and the pilot, George Talley, a second passenger, Owen Barnes, was present and riding in the left-front seat next to the pilot. The helicopter was flying from Main Pass to South Pass in the Parish of Plaquemines. It had just left Main Pass Block 51, where it had picked up the Plaintiff and was headed to South Pass Block 65-B.

The helicopter took off from Block 51 with the Plaintiff in the rear seat. Barnes was wearing headphones and as was the practice with Shell employees, was to keep a lookout to the left and front because he obscured the pilot's view. Both the Plaintiff and Barnes were wearing life vests and seat belts. The pilot was not wearing a life vest.

Soon after leaving Block 51 and about a half mile into the five to six mile trip to Block 65-B, Talley looked away to adjust his radio and saw something come under the main rotor. He immediately knew something had gone

into the motor. Barnes saw the object out of the corner of his eye and recognized it as a bird.

Immediately upon ingesting the bird, the engine began "screaming" and, according to Barnes, "we could not hear ourselves talk – it was loud." Talley testified that the bird passed through the compressor; the turbine temperature began to rise; and the air-flow became restricted with the result that the engine emitted a high-pierced whine. As a result, Talley described the engine as "not operating properly."

Barnes heard Talley radio his dispatcher several times. He first indicated that he "had a problem". He then called back and indicated that he encountered smoke. Finally, he radioed PHI and said that he didn't think he was going to make it. During this time Barnes watched the gauges and noted that the engine kept getting hotter and hotter. As it did, Talley continuously reduced power to compensate for the rising temperature.

According to Barnes the scene in the helicopter was frantic. He testified that he was afraid for his life and was hyper-ventilating and that Buras was frantic in the back seat. He asked Talley at least three times to put the helicopter down in the water and also heard Buras ask Talley to do the same. Contributing to the hysteria was that Barnes smelled smoke within the helicopter and he though the helicopter was going to explode because of the "terrrible" noise it was making. Additionally, Barnes said that Talley looked nervous and was obviously not calm.

Buras testified that when the helicopter started acting up and the scene got frantic, he asked Talley three or four

times to land. He smelled smoke and also believed the helicopter on the verge of exploding. When he tried talking to Tally, Talley told him to sit down and shut up. Buras testified that he was scared and thought he was going to die.

Talley admits that both of his passengers asked him several times to put the helicopter down in the water, that both were terrified, and one was hyper-ventilating. However, he denies that a water landing was a viable solution to their problem.

While both Barnes and Buras believe that the helicopter was only about a mile into the flight and still four or five miles from their destination, Talley insists that they were only about a mile from where they landed when the bird was ingested. He insists that Block 65-B was the first suitable landing spot under the circumstances.

All three agree that the weather was clear; the skies blue; and the seas were calm. While Talley says there was a slight chop, Barnes says that the seas were like "glass" and there were no ground swells.

Talley admits that he radioed headquarters, asked them to clear the frequency, and told them that he might have to make an emergency landing in the water, but he is resolute in his position that a water landing is the last thing he would want to do and would not do so as long as the engine is running for several reasons. First, he stresses the danger of injury from the rescue boat, such as being sucked into the propeller, crushed against the sides of a rig, caught up in the tires along the side of the boat, or scrapped by barnacles on the side of the boat. In fact,

he related that he had gotten "banged up" from a water rescue in the past.

Additionally, the helicopter would have to be towed to a platform and picked up with a crane. The floats would have to be inspected, repacked, or replaced at a substantial cost, and the engine, a very expensive item, might be lost if the helicopter were landed in the water.

When pressed on cross examination, however, Talley admitted that a major consideration as to him not landing in the water in this instance was because of his fear of the rescue boats. Despite the fact the he was not wearing his life vest, in violation of company regulations, he insists that that fact had no bearing on his refusal to put the helicopter down, however, he talked at length about the things that could happen while being pulled from the water.

The landing itself is described similarly by the three witnesses with some minor differences. Talley describes the landing as only slightly more jarring than a normal landing. The helicopter came into the platform with forward speed instead of from its usual hover and at a 45 degree angle; skidded about two feet upon impact; and bumped less than some normal landings he has had.

Barnes also testified that the helicopter was at an angle of about 45 degrees when it hit with the backs of the skids hitting down first and then the front. The helicopter slid about three feet before stopping and as soon as the helicopter landed the engine stopped. Barnes obviously overstates the speed of the helicopter at impact, but clearly indicates that it landed with a great deal of forward speed.

Buras testified that the helicopter came in for its landing very fast, as fast as the pilot could to land. It hit on the back of the skids and slid forward. He was thrown forward and got out as quickly as he could.

Essential to the Plaintiff's cause of action in this matter is whether Talley breached a duty owed to him by continuing the flight and performing the emergency landing on the platform rather than terminating the flight immediately and making a landing in the water. Certainly he owed the Plaintiff a duty, the analysis critical to this action being the standard of care owed the plaintiff in determining whether there was a breach of any such duty.

However, as the Court has previously indicated, the standard of care, whether as a common carrier or private carrier, whether under the general maritime law or the tort law of La.C.C. art. 2315, may be academic if the issue presented by this litigation is analyzed under a duty-risk analysis and an ordinary standard of care is found to have been breached. See *Harris v. Pizza Hut of Louisiana, Inc.*, 445 So.2d 756 (La.App.4 Cir.1984) concerning the application of the duty-risk analysis.

In determining the existence of an actionable tort in this matter, the Court must determine the existence of: (1) a legally protected interest; (2) against the particular hazard encountered; (3) by a rule of law; (4) which the defendant's conduct violated; (5) causation; and (6) damages. As discussed, there is no question of the existence of a duty owed by the Defendant to the Plaintiff in this case. The issue of causation and damages need to be discussed only if there is found to be a violation of that

duty, thus, the critical inquiry in this matter is the fourth factor, that is, whether the Defendant's conduct violated that duty.

In evaluating whether a legal duty has been breached, three basic inquiries may be made: (1) What, if any duty was owed by the Defendant to the Plaintiff?; (2) Was there a breach of this duty?; and (3) Were the risk and the harm caused within the scope of protection afforded by the duty breached. See *Shelton v. Aetna Casualty & Surety Company*, 334 So.2d 406 (La.1976).

Again, the duty is clear. PHI owes a duty to its passengers to operate the helicopters in a reasonably prudent manner and to take all steps necessary for the protection of those passengers. Clearly, the harm complained of in this litigation is the type contemplated by the protection afforded by that duty. Physical and psychological injury from a forced landing is certainly that type of harm. That leaves the Court with the task of analyzing whether there has been a breach of that duty.

In the duty-risk analysis, four factors have been identified which are helpful in determining the violation of a duty. They are: (1) the likelihood of the harm; (2) the gravity of the harm; (3) the burden of prevention; and (4) the social utility of the defendant's conduct.

In the business of transporting oil-field workers from land to offshore platforms, the likelihood of harm by the improper operation of a helicopter is obviously great. Any mistake can be instant and irreversible. Likewise, the gravity of the harm which may be occasioned by the improper operation of a helicopter is tremendous. Death

or serious bodily injury is certain to accompany errors in the operation of a helicopter.

The social utility of the Defendant's conduct is great. The operation of helicopters across and within the Gulf of Mexico as a means of transporting men and equipment in the oil industry is well documented and undeniable. However, this factor alone cannot outweigh the preponderance of the first two factors dealing with the likelihood and gravity of the harm which might be occasioned by that activity.

Finally, the last factor is the burden of prevention and this factor, the Court believes, is the pivot upon which the issue to be decided by the Court turns. Because of the tremendous likelihood and gravity of the harm which accompanies the Defendant's activities, despite its great social utility, it is only if the burden of prevention in terms of what might have prevented this accident is great can the Defendants escape liability.

Specifically, in this litigation the Plaintiff argues that the accident which caused his injuries could have been avoided by a landing on the water. Thus, he argues, the Defendant's pilot failed to prevent the accident and, instead, choose a course of conduct which caused his injuries.

The Defendants counter that the pilot's decision to continue the flight after the ingestion of the bird and to land on the platform breached no duty to the Plaintiff; that this action might have prevented greater injury from a water landing; and no liability attaches for that conduct.

Several factors are most relevant to the resolution of the issue of whether Talley breached his duty to the Plaintiff by continuing the flight and not terminating the helicopter's operation immediately. First, and a factor which is essential to the Plaintiff's ability to sustain his cause of action, is that the landing on platform 65-B was not a normal landing. Talley admitted that it was an "emergency" landing and was performed in a manner much different then the normal helicopter landing – coming in at speed rather than hovering and at an extreme angle. Additionally, the forced landing on the rig injured the Plaintiff. While the existence of an injury cannot be used in a duty-risk analysis to determine whether an act was performed negligently, the Court stresses that fact merely to illustrate the nature and force of the landing.

With that fact established, the Court must then determine the burden of prevention of the forced landing on the platform. That analysis involves a resolution of some conflicting testimony and an interpretation of the facts.

For instance, while Talley insists that the bird was ingested only about a mile from 65-B, both Buras and Barnes testified that it was only a half mile to a mile from their point of origin. Because of the number of radio communications which Talley admits to, the demeanor of the witnesses, and the impartiality of Barnes, the Court believes that the testimony of Buras and Barnes is correct and the helicopter flew four-fifths of the distance between the two rigs after the trouble manifested itself.

Talley insists that a water landing was not warranted nor advisable. However, the helicopter was equipped with a $35,000 set of emergency floats which are intended

to allow emergency landings on water. The Court is convinced that a water landing was a viable and readily available alternative to continuing the flight. The water was calm and smooth and, most importantly, Talley himself had made water landings in the past.

Talley testified that immediately upon ingesting the bird the engine was not operating properly and the engine failed completely upon landing on the platform. Talley even told Barnes that when they landed, "We only had one turn left." From the time the bird was ingested until landing the engine continued to overheat and the pilot was able to control it only by continuing to cut back on power. The conclusion to be drawn is that a water landing could have been performed with much more power and more safely that the landing performed on the platform.

The fact that Talley radioed PHI that he had an emergency situation and might have to make a water landing is telling as to his state of mind. At the time of that radio transmission Talley obviously believed that a water landing might be the proper course of conduct. In fact, as mentioned, Barnes overheard a transmission made by Talley wherein he indicated that he didn't believe he was going to "made it." Talley's explanation at trial that the costs involved to PHI from a water landing (towing the helicopter, reinflating the floats, replacing the engine, etc.), as well as his explanation that he didn't want to risk getting hurt by a boat picking him up, when considered with those facts, indicate that he did, indeed, merely gamble with his passengers' safety when he continued on to 65-B.

While one of PHI's experts, Walter Lamon, qualified in the field of "helicopter piloting and safety", opined that Talley did nothing wrong in the operation of the craft, he admitted that from the time of the ingestion of the bird the helicopter was not air-worthy. Lamon suggested that 65-B was the only "practical" landing area and that Talley always had the option of a water landing while continuing on to the platform.

However, if a water landing performed soon after the ingestion of the bird with full power (or before there had been a substantial cutting back in power) would have resulted in no injury to the Plaintiff, then the conclusion becomes inescapable that the water landing was a reasonable means of preventing this accident. While the water landing certainly would not have been a normal landing, the fact that the helicopter is equipped for such a landing; that it would have been with greater power; that the risk of impacting the rig would have been eliminated; and that it is much more likely that the landing itself would not have caused injury, all indicate that it was a means of preventing the Plaintiff's injuries.

The violation of a rule or regulation can have a bearing on whether a duty was breached in terms of failure to prevent an accident. Michael Hynes, qualifies by the Court in the field of "safe helicopter operations and piloting", was called by the Plaintiff to render an opinion as to the pilot's actions in this matter.

It is Hynes opinion that the helicopter should have been landed in the water and Talley's actions violated FAA regulations requiring that a flight be discontinued due to mechanical problems. In fact, PHI was cited by the

FAA for this action. Most significantly, Hynes believed a water landing would have been a "powered" landing rather than the forced landing on the rig.

Hynes reviewed PHI's operations manual and found that its provisions, paralleling federal regulations, required that the flight be discontinued by landing immediately rather than the "calculated risk" of continuing to the rig. Hynes believes that the noise made by the engine, as described by the witnesses, indicated that there was structural damage to the engine and it could have failed at any time.

Additionally, Hynes reviewed Talley's personnel file and found indications that PHI had commended Talley for prior landings of helicopters with engine failure on rigs, in his words "stretching" flights to rigs rather than making water landings. Hynes believes that PHI has encouraged Talley to do what was performed in this instance.

Lamon's testimony is logical and compelling. He denied that ditching the helicopter in the Gulf was a viable option and described the landing on the platform as proper under the circumstances. He explained the extra forward speed upon landing was necessary to maintain control and, as mentioned, he diminished the risk from continuing on by stating that Talley could autorotate down into the Gulf if the engine failed at any time.

However, this testimony is compelling only if the primary consideration were whether Talley succeeded in saving the helicopter. If the pilot's main consideration is the fulfillment of his duty to his passengers and avoiding

injury to those passengers, then this testimony is superfluous because, if landing in the Gulf is a reasonable means of preventing injury, the pilot breached his duty.

As to the status of PHI as a common or private carrier, the evidence is contradictory. While Hynes believes PHI to be a common carrier, both Vernon Albert, the chief pilot and a vice-president of PHI, and Walter Lamon deny that PHI has that status and insist that they are a private carrier. This Court believes the *Duhon* decision is compelling and considers PHI to be a common carrier owing a very high degree of care to its passengers.

It is not insignificant that PHI's sole function as an entity is to ferry passengers. While they argue that they are not generally available to the public, the company has no other apparent function other than that carrier service which resulted in the Plaintiff's injuries. Were PHI to be a company which performed oil exploration, for instance, and maintained a fleet of helicopters for its own use and also ferried some passengers of major customers, their argument would be stronger.

However, this Court believes that PHI has violated even an ordinary duty or standard of care owed its passengers in this case. Under any standard, Talley's actions in risking the safety of the passengers for the sack [sic] of protecting himself and the helicopter is a breach of his duty.

From the facts of this case and the above analysis, the Court draws the following conclusions:

(1) The helicopter ingested the bird soon after leaving Block 51 and the pilot continued the flight to the next

platform despite that fact that it was as much as four or five miles away;

(2) The procedure of putting the helicopter down in the Gulf was a viable alternative in this situation for the following reasons:

(a) The helicopter was equipped with floats for such a procedure;

(b) The procedure of landing a helicopter with engine trouble was common in the Gulf and the pilot, George Tally, had performed the same procedure several times himself;

(c) The weather conditions and the conditions in the Gulf were conducive to a water landing;

(d) There was a very low likelihood of injury from a powered landing in the water;

(3) The pilot chose to continue the flight and attempt a landing on Block 65-B due to fears for his own safety involving a retrieval from water and out of a concern for the economic impact to his employer from putting the helicopter down in the water;

(4) Concern for the safety of his passengers played no part in the decision making process of the pilot in this matter;

(5) The forced landing on Block 65-B was not a normal landing due to the un-airworthiness of the helicopter occasioned by the ingestion of the bird and the impending failure of the engine;

(6) The pilot owed a duty to his passengers to exercise a high degree of care for their safety. He failed to do

so and chose a dangerous course of conduct which caused harm to one of his passengers rather than choosing a reasonable and alternative course of conduct which, in all probability, would have avoided injury to his passenger;

(7) Even if the pilot owed his passenger only an ordinary standard of care, his conduct violated that standard.

The Defendants argue that the forced landing on the rig did not cause the Plaintiff's injuries. The determination as to whether the pilot's actions are the legal cause and the cause-in-fact of Buras' injuries are interrelated.

The Court finds that the pilot's failure to terminate the flight by making a water landing and making an emergency landing on the platform is the cause-in-fact of Buras' injuries. But for Talley's decision to continue the flight and to make such a landing Buras would not have been injured.

Likewise, the evidence establishes that the impact of the helicopter on the deck of the platform caused Buras' injuries. While it was a relatively minor impact in terms of the type of impact that can come about from a helicopter falling from the sky, all of the evidence establishes that it caused the injuries complained of by the Plaintiff.

It is clear that Buras immediately began seeking medical attention for both his physical injuries and his psychological problems soon after the accident. He attempted to work for a short period of time but had to soon quit. His treating physicians relate his complaints to that incident and, as discussed hereinbelow, are separate

and distinct injuries from the preexisting conditions stressed by the Defendants.

The Court also rejects any suggestion that fault should be apportioned based on a determination that Buras contributed to his injuries by any fault on his own. While there is some indication that he may have undone his seat belt at one point, the evidence establishes that, at landing, he was wearing his lap belt and the Court can discern no basis for finding that Buras contributed to his own injuries.

DAMAGES

Buras complains substantially of a back injury with related psychological disorders. His treating physician for the back problem is Dr. R.C. Llewelan who testified on Buras' behalf.

Buras attempted to continue working after the September 20, 1988, helicopter accident. However, he suffered form back pain and his nerves bothered him and he was examined and treated by several different doctors. Soon after the accident Buras sought treatment from his family doctor, Dr. Bahr, who gave him medication for his nerves. After several weeks of trying to work, Buras stopped due to his back pain and from always being drowsy from the nerve medication.

Buras sought treatment form Dr. Llewelan, a neurosurgeon, for his back injury some time after the accident. Llewelan testified that he would have discharged Buras to return to work on March 10, 1987, but only if the company doctor would concur. However, Buras returned

to him on May 17, 1989, complaining of significant low-back pain radiating into his legs with burning in both legs. Llewelan related these complaints to the helicopter accident.

In the interim Buras had been treated by doctors Juneau and Murphy and CAT scans and x-Rays had been taken. He had also been treated conservatively. Additionally, Buras had continued to see Dr. Bahr who noted that Buras had diarrhea from stress, as well as headaches, earaches and nervousness.

Llewelan reviewed the treatment by each of these doctors, as well as a summary done by Dr. Kleinschmidt from an examination performed on November 29, 1988, and by that May 17, 1989, examination believed Buras to be a candidate for surgery. However he would not perform surgery until further diagnostic tests could be performed and those could not be done due to Buras' psychiatric condition.

During the next two years Buras continued to see Llewelan as well as several orthopedic surgeons. However, Buras also began a course of psychiatric treatment with Dr. Candace Cutrone, a specialist in the field of general psychiatry. This course of treatment complicated and delayed the treatment for his back injuries.

Dr. Cutrone first saw Buras in December of 1988 on a referral from Dr. LeMay who had admitted Buras to the hospital with a diagnosis of post traumatic stress disorder (PTSD). Dr. Cutrone has made that same diagnosis and has treated Buras for that disorder up to the time of trial.

Dr. Cutrone describes PTSD as an anxiety disorder, that is, a cluster of symptoms stemming from an incident. In the case of Mitchell Buras, it has manifested itself through anxiety, avoidance symptoms, irritability and rage-full outbursts, decreased ability to enjoy pleasurable experience and intrusive dreams. Buras has also experienced sexual disfunction [sic] as a result of his mental state.

She treated Buras with medication as well as counseling in her office on a regular basis. Additionally, Buras has been admitted into the psychiatric ward of West Jefferson Hospital on six or seven occasions due to the exasperation of his symptoms and occasional suicidal ideations.

Dr. Cutrone was responsible for having Buras' surgery deferred because of his mental state and he was under her care when the surgery was performed. That surgery, performed by Dr. Llewelan on June 27, 1991, consisted of a bilateral partial hemilaminectomy at L4 and a bilateral foraminotomy, partial medial facetectomy at L3-4.

Complicating the issue of Buras' medical condition are pre-existing conditions of the back and prior psychiatric problems. For instance, Llewelan had treated Buras for an injury from a slip and fall on November 3, 1986. As a result of that incident, which involved complaints of pain in the neck and back, Llewelan performed diagnostic tests which showed a spondylolysis in Buras' back at L-3, L-4. The treatment for this injury involved six weeks of physical therapy and medication.

Llewelan described the condition discovered as a result of those tests as a congenital condition which was potentially unstable but not symptomatically unstable. While Llewelan felt that this condition would induce him to recommend that Buras not engage in heavy manual labor, Llewelan placed no restrictions on Buras' activities. Buras' condition had become completely asymptomatic prior to the helicopter accident.

The Defendants offered at trial, in support of mitigation of causation of the psychiatric injury, evidence of a thirty day hospitalization for alcohol abuse of Buras in April of 1986. These records include reports of blackouts, violent behavior and several suicidal gestures related to episodes of alcohol abuse.

Dr. Cutrone negated the importance of these incidents, however, in terms of his present condition. She had these records in her possession and indicated that she believed they were related to a separation and ultimate divorce from his wife that Buras was going through. While they were an indication of pre-existing problems with depression, they were not evidence of a major depression disorder so as to be significant or relevant to his present condition.

While the Defendants argue the significance of Buras' pre-existing conditions, a defendant takes his victim as he finds him and is responsible for all of the natural and probable consequences of his tortious conduct. When a pre-existing condition exists, the defendant must compensate the victim to the full extent of the aggravation of that condition. In a case in which the injured person's complaints were very similar to Buras', *American Motorist*

v. American Rent-All, 579 So.2d 429 (La.1991), at 433 the court found:

> "Mrs. Walton was asymptomatic prior to the accident. She experienced neck and back pain following the accident. We further find that the record supports the conclusion that the trauma of the accident caused Mrs. Walton's underlying psychiatric condition to manifest itself and that her present depressed state was triggered by the injuries caused by the accident."

Despite the fact that the plaintiff in the *American Motorist* matter had been hospitalized on two separate occasions for depression prior to the accident and had been treated by a psychiatrist for thirteen years, and despite the testimony of Dr. Remy Culver who examined the plaintiff only once before testifying for the defense, the court approved no reduction in the plaintiff's award because of that pre-existing condition, based upon the above rationale.

Similarly, in *Miley v. Landry*, 582 So.2d 833 (La.1991), the plaintiff had been hospitalized for two and a half months, seven months, and two weeks on three separate occasions from 1971 to 1973 for her "schizophrenia, schizo-effective type, depressed" condition. Additionally, in 1979 she underwent a lumbar laminectomy and then, in 1983 a posterior, lumbar fusion and the excise of a ruptured disc. As a result of an accident in 1985 she complained of back pain and the onset of severe psychiatric problems including depression.

The trial court denied the plaintiff any damages for psychiatric injuries based on her pre-existing condition and awarded her only about $17,000.00 for a soft tissue

injury which he found aggravated her previous back injury. The trial court denied any recovery for her psychiatric injury, finding that: "Mrs. Miley's hospitalization probably would have occurred even if the accident had not happened." The appellate court upheld the trial court in a two sentence per curiam opinion which adopted the reasons of the trial court.

The Supreme Court reversed that decision and awarded the plaintiff past and future medical expenses and $300,000 for past and future physical and mental pain and suffering, finding that, at 837:

> "Although Nelda Miley's descent into psychosis might have occurred without the automobile accident, Dr. Ehrlich testified that her illness was precipitated by the accident. The other evidence all substantiates that opinion. When a defendant's negligent conduct aggravates a pre-existing condition, the victim must be compensated for the full extent of the aggravation."

Similarly, the evidence in this matter indicates that despite the pre-existing condition of spondylolysis and the prior injury in 1986, it was this accident which made the Plaintiff's condition symptomatic. While the Defendants urge that the 1986 slip and fall accident and treatment diminish the significance of his present injury, it has the opposite effect.

Because the Plaintiff was treated conservatively, returned to work, and exhibited no symptoms of pain during his tenure as an active employee of Shell, and became symptomatic only after the accident complained of in this matter, the 1986 slip and fall is evidence that the

present condition, in terms of causation and severity, is the result of the helicopter accident.

The psychiatric injury is similarly resolved. While the Plaintiff clearly had prior problems with alcoholism and depression, he was completely asymptomatic prior to this incident. There is no evidence that the severe psychiatric problems from which he now suffers and related treatment are not the result of the helicopter accident.

To the extent that the Plaintiff was more susceptible to such injuries is irrelevant. The evidence in this matter establishes that the pre-existing conditions of the Plaintiff have been aggravated and made symptomatic as a result of the fault of the Defendants.

As to Buras' future prognosis, Llewelan testified that he believes Buras to be permanently and totally disabled from any type of manual labor, including light duty. He believes Buras has achieved maximum response to neurological care and further surgery is not indicated, and Buras has a 7 1/2% anatomical loss to the entire body. Llewelan would refer Buras to orthopedic evaluation for the possibility of that type of treatment in the future.

Dr. Cutrone believes that Buras will need some type of treatment indefinitely. She anticipates that this will involve a course of medication and office visits at least every one or two months, and she also believes Buras' condition to be permanent.

To counter this testimony, the Defendants offered the testimony of Dr. Mark Juneau, an expert orthopedic surgeon. Juneau saw Buras first on December 6, 1988, and then treated him until March, 1989. During this time

Juneau noted the absence of objective findings of pain but diagnosed a developmental problem, probably spondylolysis.

Juneau did not see Buras from March, 1989, until October 27, 1993, when he did at the request of defense counsel. At that time Juneau found no objective findings and still noted the spondylolysis with some additional degeneration. Juneau admitted that he had never seen any EMG's performed on Buras and, as of the October, 1993, examination, had not seen the operative report of Buras' surgery.

Juneau confirmed that spondylolysis is often asymptomatic and can become so as the result of trauma. Based on what Juneau learned of the surgery, he found that Buras has a 20% anatomical disability and is permanently impaired from manual labor.

As to Buras' psychiatric condition, the Defendants had Dr. Remy Culver, a psychiatrist, examine Buras on one occasion. Based on that examination he opined that Buras does not suffer from PTSD, rather, his history of alcoholism and a dependent personality disorder have exaggerated his complaints arising from the helicopter accident.

Culver testified that he believes Buras to be malingering and the helicopter accident was not the type of incident which would cause PTSD. However, Culver did not review the West Jefferson records of Buras' psychiatric treatment, did not have details of the accident, and did not believe Buras' dream history. This opinion was based, in part, on a one hour interview.

Again, while the Defendants would suggest that this evidence establishes that all of Buras' complaints are directly the result of his pre-existing condition, they have failed to carry their burden in establishing such a fact. The treating physician in this matter, Dr. Llewelan, specifically found, based on his examinations, treatment, and review of the findings of the other doctors, that Buras suffered his injury at the time of the helicopter accident. The need for surgery and the symptomatic aspects of his back are the result of this accident.

Likewise, Dr. Cutrone clearly differentiates between Buras' prior treatment for alcoholism, related to a divorce, and the condition she has treated related directly to the helicopter accident. Particularly significant to both these issues is the fact that Buras passed a pre-employment physical with his employer and performed satisfactorily in his job for several years, even earning an achievement award form [sic] Shell in November of 1987.

Buras dropped out of school in the seventh grade to go to work and eventually earned a GED. He was a slow learner in school and has no education other than that. He has a history of menial jobs including a stock clerk in a grocery store, a shrimper and hunter, and a roustabout. However, he always had a job and was productive for his entire life until this accident.

He began work for Shell about ten years ago and had no problems other than the 1986 back injury for which he missed some work but he relates that he had no problems once returning to work.

Buras attributes his alcohol problems to a divorce based upon him catching his wife in bed with her

employer. Based on that and the fact that his wife would not let him see their daughter, he began abusing alcohol, eventually leading to his voluntary admission to the hospital.

Since the accident Buras has suffered constant pain in his back and rage and anger over his inability to work, to engage in any of the leisure activities that he was accustomed to, or to even have sex. He has admitted himself to West Jefferson hospital because of the rage he has felt and has slept with a gun, wanting to kill the people at PHI who he feels are responsible for his condition.

He admits to a long-time problem with alcohol and anger management but denies that he had any problems with his nerves until this accident. Now he has almost constant diarrhea, stays locked up in his house, will not socialize with his family and friends, and gets violent at the sound of a helicopter.

A vocational rehabilitation expert called by the Plaintiff by report, Glenn Hebert, believes that Buras is not a candidate for rehabilitation services because of his total disability. Because of his borderline intelligence and history of low-skilled jobs he would only qualify for low-skilled jobs in the future.

The interrelationship between the Plaintiff's back problems and psychiatric complaints makes the determination of the amount of damages he has suffered somewhat difficult. However, there are reported cases with similar factual situations, such as the *Miley* and *American Motorist* decisions, cited hereinabove, which are helpful.

The Court finds that the psychiatric complaints of the Plaintiff are much more significant then [sic] his back injury. Were he to be suffering only from the residual problems associated with his back he might return to some type of employment and manage the pain and incapacity associated with that physical condition. However, his psychiatric condition makes that impossible.

Buras is presently in such a state that he is rendered totally disabled. The effects of the PTSD and the limitations on his physical activities from his back have completely emaciated him.

The injuries and treatment, as well as the facts discussed hereinabove relating to the plaintiff in the *American Motorist* decision are strikingly similar. The plaintiff in that matter was initially treated by Dr. Juneau and then sought treatment from Dr. Llewelan. She was treated conservatively for quite some time and attempted to work through her problems. As mentioned, she became depressed and suffered an onset of deep psychiatric problems as a result of her accident and physical condition.

In the *American Motorist* matter, the Supreme Court found that an award of $300,000 for the plaintiff's physical pain and suffering to be too high and reduced that award to $150,000. Likewise, a similar award for her mental anguish and distress was reduced to $150,000, for a total award of $300,000. Again, the plaintiff's complaints in that matter are so similar to Buras' that this Court cannot ignore the rationale of that decision.

In finding that similar awards are justified for Buras, that is, $150,000 for his past and future physical pain and suffering and $150,000 for his past and future mental

anguish and distress, this Court has also considered the precedent of the *Miley* decision ($300,000 for past and future physical and mental pain and suffering); *Austin v. Pascarelli*, 612 So.2d 201 (La.App.4 Cir. 1992) – ($250,000 in general damages for a discectomy/fusion and depression); *Goldman v. Mullin*, 612 So.2d 901 (La.App.4 Cir.1993) – ($250,000 in general damages for a cervical fusion/laminectomy with depression); *Hoffman v. Travelers Ins. Co.*, 587 So.2d 143 (La.App.4 Cir. 1991) – ($440,000 in general damages for a cervical discectomy/fusion with a severe impact on the plaintiff's personal life).

The Plaintiff has established medical expenses in the amount of $72,894.55. While the Defendants urge that many of these expenses are for treatment for pre-existing conditions or for treatment past the time that Buras could have returned to work, those issues have been resolved against the Defendants. Thus, the Plaintiff is awarded the full amount of those medical expenses based on the finding herein that his various treatments are directly related to this accident.

While the Plaintiff argues that he is entitled to an award of future medical expenses for treatment for both his physical and psychiatric injuries, he has failed to establish with any certainty the need for or the costs of future medical care for his back injury. Dr. Llewelan testified that Buras has achieved maximum response to neurological care and an orthopedist would have to determine the need for future intervention of that nature. No proof of such need was forthcoming. There is evidence of the costs of the medication being used by Buras as a result of his back pain. The evidence in this matter

establishes that he will need to use medication indefinitely. Thus, the Court has awarded $2,000.00 for the future costs of medication.

However, Dr. Cutrone did establish Buras' need for treatment for his psychiatric injury indefinitely. She testified that Buras should seek treatment at least every two months at a costs [sic] of $110.00 for an office session and $50 for a medical management session. This total costs [sic] of $160 every two months may be extended outward during Buras' life expectancy of about 33 years to arrive at a total figure of what those visits would cost if Buras attended every one on that schedule. However, the Court is not convinced that a reasonable certainty of such a faithful attendance has been established and finds the full figure is not warranted. Thus, the Court, based on the evidence, anticipates that a lower number of sessions will actually result, and awards the sum of $20,000.00 for that medical treatment.

As to Buras' claim for lost wages, specifically until the time of trial, it appears from the record that he was paid his wages until December, 1989. Dr. Randy Rice, the Plaintiff's economic expert annualized Buras' 1988 earnings at $40,259. However, Buras' income tax returns show that he earned $27,153 in 1986 and $25,760 in 1987. His actual earnings in 1988 were $34,193 and the Court believes that Rice, in "annualizing" that figure assumed that Buras had not been paid after being hurt. That is not the case.

It appears that the actual income Buras earned in 1988 was $34,193. While Dr. Kenneth Boudreaux, the

economist for the Defendants arrived at a lost wage figure by averaging Buras' earnings for the three years prior to the accident, the Court believes the figure is more correctly based on what he was earning at the time of his injury.

The Plaintiff has argued that applicability of state law to this matter in order to assert a wage claim without consideration of income taxes, while the Defendants stress that any lost wage determination must be made net of income taxes under the general maritime law. The latter proposition is clearly the law and, as the Court has previously indicated, the general maritime law applies to the Plaintiff's claim. Under the authority of *Gaston v. G & D Marine Services, Inc.*, 93-CA-0182 (La.App.4 Cir, 1/19/94); 631 So.2d 547; *O'Bryan v. Folk Const. Co.*, 594 So.2d 900 (La.App.4 Cir.1991), the past wage figure, net of income taxes is $140,050 based on the $34,193 yearly figure.

As to a determination of loss [sic] future income, the Court agrees that the calculation is more validly based on an average wage base and net of income taxes. Therefore, considering some of the calculations, methodology, and opinions of both experts, and considering both the figures on work-life expectancy and the discount rates used by Rice to be more realistic, the Court deems an appropriate award of future wages to be $339,074.00.

The damages awarded may be summarized as follows:

Past medical expenses	$ 72,894.55
Future medical expenses	22,000.00
Past wage loss	140,050.00
Future wage loss	339,074.00
Past & future mental and physical pain & suffering	300,000.00
TOTAL	$874,018.55

INTERVENTION

Buras' employer, Shell Pipeline, Inc., filed an intervention in this litigation to recover workers compensation benefits paid Buras after this accident. By stipulation the amounts were established as follows: medical payments – $3,732.34; compensation payments – $6,155.68; and "Shell Disability Benefit Plan" payments of $12,358.06. Additionally, the Plaintiff's workers compensation claim against Shell was settled for $60,000.00, without any waiver of Shell's right to seek reimbursement of that figure.

At issue is the nature of the disability benefit payments and their status as a reimbursable payment by Shell. Shell argues that those payments are the result of a program intended to benefit the injured employee and, because the plan is funded completely by Shell with no contribution by the employee, they are reimbursable.

The essence of Shell's argument deals with LSA-R.S. 23:1225(C)(1), which provides for the satisfaction of an

employer's obligation to pay compensation benefits if the injured employee is receiving benefits from any one of several sources. One of those sources are benefits under a disability benefit plan to the proportion that it is funded by the employer.

That statute and the cases interpreting it clearly reduce an employer's *obligation* to pay compensation to the extent that the employee is receiving the delineated benefits. Shell seeks to extend the rationale of that statute and cases to provide that Shell is entitled to reimbursement to the same extent. They equate a "credit" to which they are entitled for the employee's receipt of those disability benefit plan payments with their separate and unrelated right of reimbursement.

The statute upon which Shell's right of reimbursement is based, R.S. 23:1101, provides that Shell's right is to "recover any amount which he has paid or becomes obligated to pay as compensation to such employee or ~~his~~ dependents." This statute does not limit Shell to the amount of compensation actually paid, rather, it allows Shell to seek the compensation it was obligated to pay. However, because its obligation is reduced by virtue of the employee's receipt of benefits from the disability benefit plan, it cannot now recover sums paid for which it was not obligated.

This may create a certain inequity in that Shell funded the disability benefit plan, however, the statutes are clear. On the one hand, Shell's *obligation* to pay benefits was reduced by virtue of the employee's receipt of disability benefit payments. On the other hand, Shell has

a right of reimbursement only to the extent of its obligation to pay. Shell is not awarded reimbursement herein for those benefits.

Plaintiff seeks credit from the reimbursement granted Shell for his attorney's fees in accordance with R.S. 23:1103. However, the intervention was established by stipulation and no evidence was forthcoming on any issue relating to offsets or reductions for attorney's fees or costs. The Court does not have before it any means to determine the proper measure of the reimbursement of such attorney's fees. Therefore, that request is denied.

INTEREST

Interest is to run on all of the damages for past loss from the date of Buras' injury, that is, September 20, 1988. Interest is to run from the date of this judgment on the future damages which are determined to be as follows:

Future Medical Expenses ..... $ 22,000.00

Future Lost Income 339,074.00

Future General Damages 200,000.00

The Court has made a totally arbitrary determination of the proportion of the general damage award which is for past loss and for future loss. While totally unscientific and perhaps flawed, it is in accord with decisions such as *O'Bryan* and *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La.App.4 Cir.1993), writ denied, 613 So.2d 996 (La.1993), cert denied 113, S.Ct. 3020 (1993), and is as reasonable a determination of the apportionment thereof which this Court can make.

Judgment has been rendered in this matter in accordance with these reasons, this 18th day of October, 1994.

/s/ William A. Roe
JUDGE

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 33-322 DIVISION "B"

MITCHEL BURAS

VERSUS

PETROLEUM HELICOPTERS, INC.; GEORGE TALLEY AND BELL HELICOPTER TEXTRON, INC.

FILED: NOV 17 1994 /s/ Candace D. dufrene
DEPUTY CLERK

AMENDED JUDGMENT

This matter came on for trial on the 22nd and 23rd days of November, 1993.

PRESENT: PHILLIP F. COSSICH, JR., MICHAEL ST. MARTIN, and CAROLYN McNABB for the Plaintiff, Mitchell Buras;

KENNETH H. LABORDE, and LEO R. McALOON, III, for the Defendant, Petroleum Helicopters, Inc.;

When after hearing the evidence, the stipulations and argument of counsel, the Court considers the law and the evidence to be in favor of the Plaintiff, for the reasons assigned this date in writing;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Plaintiff, Mitchell Buras, and against the Defendants, Petroleum Helicopters, Inc., in the sum of EIGHT HUNDRED SEVENTY-FOUR THOUSAND EIGHTEEN AND 55/100 ($874,018.55) DOLLARS, which is itemized as follows:

(1)	General Damages:	$300,000.00
(2)	Loss of Future Wages:	339,074.00
(3)	Future Medical Expenses:	22,000.00
(4)	Past Medical Expenses:	72,894.55
(5)	Loss of Past Wages:	140,050.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Intervenor, Shell Pipeline Corporation, and against the Plaintiff, Mitchell Buras, in the sum of SIXTY-NINE THOUSAND EIGHT HUNDRED EIGHTY-EIGHT AND 02/100 ($69,888.02) DOLLARS, plus legal interest from date of judicial demand until paid.

IT IF FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are ordered to pay all costs of these proceedings, including expert witness fees, plus judicial interest from the date of judgment on the following elements of damages awarded herein:

(1)	Future Lost Income:	$339,074.00
(2)	Future Medical Expenses:	22,000.00
(3)	Future General Damages:	200,000.00

and judicial interest from the date of injury, September 20, 1988, until paid on the remaining damages awarded herein.

As stipulated at the pre-trial conference, no evidence was presented against Defendant, Bell Helicopter Textron, Inc. Accordingly:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Bell Helicopter Textron, Inc., dismissing all claims asserted against it, with prejudice.

JUDGMENT READ, RENDERED, AND SIGNED at Pointe-a-la-Hache, Louisiana, this 17th day of November, 1994.

/s/ William A. Roe
JUDGE

APPENDIX C

The Supreme Court of the State of Louisiana

MITCHELL BURAS

VS. NO. 98-C-0171

PETROLEUM HELICOPTERS, INC., ET AL

IN RE: Petroleum Helicopters Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 33-322; to the Court of Appeal, Fourth Circuit, Number 95CA-1629

March 20, 1998

Denied.

WFM
PFC
HTL
CDK
JTK

JOHNSON, J. not on panel.

VICTORY, J. would grant the writ.

TRAYLOR, J. would grant the writ.

Supreme Court of Louisiana
March 20, 1998

/s/ John Tarlton Olivier
Clerk of Court
For the Court

Supreme Court, U.S.
FILED
JUN 20 1998
OFFICE OF THE CLERK

No. 97-2052

In The

Supreme Court of the United States

October Term, 1997

PETROLEUM HELICOPTERS, INC.,

Petitioner,

vs.

MITCHEL BURAS,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

On September 20, 1988, a helicopter owned by Petroleum Helicopters, Inc. ("PHI") and piloted by PHI employee George Talley sustained engine damage while flying over the Gulf of Mexico when a bird was ingested into the aircraft's turbine engine. Rather than making an immediate and proper precautionary landing, Talley attempted to stretch the flight out and continue onward to his original destination, an offshore oil platform. Mitchell Buras ("Buras"), a passenger aboard the helicopter, sustained severe physical, mental and emotional injuries when Talley slammed the helicopter onto the offshore oil platform.

Buras' case against PHI was tried before the honorable William A. Roe of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana. Judge Roe found PHI and Talley liable for the accident and the resultant injuries to Buras in an extensive and well reasoned 26 page decision.

PHI was displeased with the trial court for rejecting its version of the facts and appealed to the Louisiana Court of Appeal for the Fourth Circuit. The case was fully briefed and argued to the Court of Appeal and, in another extensive and well reasoned decision, the Court of Appeal affirmed the trial court and rejected the "spin" that PHI attempted to put on the facts.

Dissatisfied yet again, PHI filed a writ application with the Louisiana Supreme Court. Realizing the hopelessness in showing manifest error in the trial court's factual findings, especially as affirmed by the Court of Appeal, PHI attempted to cloak its dissatisfaction with the findings of fact as an assignment of legal error. The Louisiana Supreme Court denied PHI's writ application.

PHI's response was to petition this honorable Court for a writ of certiorari to review these decisions. Buras has filed the instant memorandum in opposition to this writ application.

In its writ application, PHI attempts to convince this honorable Court that the trial court, as well as the Court of Appeal, committed the legal error of failing to apply the standard of care for emergency situations established by the general maritime law. However, the trial court's ruling was made with a full understanding of the "sudden emergency" doctrine. The trial court found PHI liable because the pilot's actions were unreasonable under the circumstances, a factual conclusion that supports holding PHI liable even under the "sudden emergency" doctrine. Furthermore, the decision of the Court of Appeal was also made with a full understanding of the "sudden emergency" doctrine. The Court of Appeal specifically acknowledged that the record contained ample evidence to support Judge Roe's factual conclusions. A review of the evidence, Judge Roe's written reasons for judgment, and the decision of the Court of Appeal clearly show that both decisions are sound.

In truth, the picture that PHI now paints for this honorable Court is not the same as seen by Judge Roe. The evidence at trial showed a reckless helicopter pilot that took a risk and lost. The pilot was faced with several options; but, as the evidence showed, and as Judge Roe heard, he chose the most dangerous and an unreasonable option, the one that would save his employer's helicopter. He "stretched" the flight to his original destination — a platform four to five miles away, a decision that Judge Roe found to be unreasonable under the circumstances.

The safe option would have been to set the helicopter down on its floatational devices in the calm waters of the Gulf as it was designed and equipped to do. However, this would have

cost his employer more money in retrieval and repair costs. Moreover, the pilot was not wearing a life vest as mandated by company regulations, influencing his ability to make a rational decision. Judge Roe correctly decided that saving the helicopter should not have been an issue to the pilot. The issue was whether PHI and its pilot met their duties to their passengers. No court can properly conclude that the well-being of a helicopter is more important than the well-being of its passengers. Nevertheless, this is what PHI requested.

In asking this honorable Court to recognize the emergency circumstances under which the pilot was operating, PHI fails to mention that it was the pilot's own choices that elevated the circumstances to a dangerous level. The situation became more dangerous every second the pilot continued to the far away platform. Indeed, with only its last breath of energy did the helicopter slam onto the platform, causing severe injury to Buras. PHI's pilot heightened the emergency, and now PHI wishes to argue that emergency circumstances should lessen its standard of care toward Buras.

This is not the case of a pilot faced with a split second emergency decision. This is a case of a pilot who, despite his training, despite the PHI safety rules, despite the pleadings of his passengers, and despite the dictates of reasonable judgment, made a conscious decision to place the value of his helicopter above that of his passengers and continue on to his original destination.

FACTUAL BACKGROUND

PHI leaves much of the facts and evidence that Judge Roe heard out of its treatment of the case. On the day of the accident, Talley was flying a PHI helicopter from an offshore platform at Main Pass Block 151 to an offshore platform at South Pass

Block 65-B, four to six miles away. He was carrying Buras and another passenger, Mr. Owen Barnes. (R. Vol. 3, pp. 35-36; R. Vol. 4, p. 157). The skies were clear and the seas were calm — "smooth like glass." (R. Vol. 3, pp. 38-39, 61).

About one-half mile after departing the Block 151 platform, the helicopter engine ingested a bird and the turbine out temperature ("TOT") gauge immediately began rising. (R. Vol. 3, pp. 40, 64; R. Vol. 4, p. 73). According to Owen Barnes, the engine began making a "loud screaming noise," over which one could not hear himself talk. Barnes also detected smoke in the helicopter. (R. Vol. 3, p. 63). Buras' testimony corroborates this. (R. Vol. 4, pp. 71, 107). The pilot radioed his dispatcher and declared an emergency; he told the dispatcher about the smoke in the cockpit. (R. Vol. 3, pp. 49, 63). Talley also told the dispatcher that he did not think they were going to make it to the Block 65 platform. Barnes, an experienced helicopter passenger, was continually looking at the helicopter's temperature gauge. He noticed that the engine was getting hotter and hotter. In response, Talley took more and more power away from the engine. (R. Vol. 3, pp. 66, 68). Both passengers pleaded with Talley to set the helicopter down.

Talley admitted that after the bird went into the engine the helicopter was not operating normally. He further admitted that when an aircraft is not operating properly, the PHI emergency procedures manual requires that a precautionary landing be made **immediately**. This is precisely the reason why the helicopter is equipped with pop-out floats, to land and float on water. However, instead of making the safe precautionary landing in the calm Gulf waters below, Talley chose to proceed to his original destination, the South Pass 65 Baker platform. (R. Vol. 3, pp. 42-43, 47, 147). He made this decision despite the fact that he still had approximately five miles to travel to reach this destination.

According to Barnes' description, the helicopter continued to lose power, and approached the landing pad at Block 65 at a speed of about 50 or 60 miles per hour, until it reached a point about three feet from the pad, where it slowed and "slammed" onto the landing pad. (R. Vol. 3, pp. 71-72). Buras agreed: "We came in a very fast landing"; the helicopter hit the platform on the back axle and then came down on the front and slid. (R. Vol. 4, p. 73).

At the time of the accident, Talley was the only person on the helicopter not properly suited for a water landing, since he was not wearing his life vest. (R. Vol. 3, pp. 45-46). PHI vice-president, Vernon Albert, testified that PHI first reprimanded Talley for this practice only about three weeks before trial. (R. Vol. 4, p. 191). Nevertheless, Barnes had flown with Talley in a helicopter about ten days prior to the trial, and at that time, Talley was still not wearing his life preserver as required by PHI rules. (R. Vol. 3, p. 75).

As a result of the incident, the helicopter sustained about $33,500 of damage. (R. Vol. 4, pp. 171-172). The engine was damaged so severely that it was basically replaced while the helicopter was still on the platform at Block 65-B. (R. Vol. 3, p. 119). This extensive damage is still meager in comparison to the $350,000 loss PHI could have sustained had Talley made the landing in the Gulf waters. (R. Vol. 4, pp. 196-197). Talley saved PHI a great deal of money by placing the value of the helicopter over the value of his passengers' safety.

Buras called Michael K. Hynes, a specialist in aviation and aviation education, as an expert witness. Hynes is a designated federal aviation administration ("FAA") examiner and acts on behalf of the FAA in issuing pilot certificates to licensed applicants. He teaches aviation at two universities in Oklahoma. Mr. Hynes' teaching curriculum specifically includes aeronautical

decision making/risk management, both at management and pilot operational levels. Mr. Hynes was qualified by the court as an expert in safe helicopter operation and piloting, state F.A.R. 135 operations, engine failure, accident prevention, and aeronautical decision making and risk taking. (R. Vol. 3, pp. 103-107).

Hynes testified that PHI's pilot safety manual required a "precautionary landing" in the event of engine malfunction so the situation does not turn more serious. According to Hynes, Talley violated this safety rule. Instead of making the mandated precautionary landing in the calm Gulf waters, Talley continued the flight to the platform. (R. Vol. 3, p. 110). Hynes also noted that Talley was in violation of PHI regulations by not wearing his life vest. (R. Vol. 3, p. 112). Hynes specifically testified that immediately after the engine malfunctioned:

> [Talley] . . . was fortunate enough to have an opportunity to use whatever availability the engine still has, and go ahead and make a precautionary landing as soon as possible. Because of the water conditions, he's got a wide open area right behind him. I would have preferred that he go to the water rather than even go to the platform behind him because if you have an engine failure as you are approaching the platform, that puts in another high risk set of equations. The recovery from that event, generally is catastrophe. You are not in the risk taking business. You don't want your passengers buying a chance of safe transportation.

(R. Vol. 3, pp. 113-114).

Hynes concluded that if Talley had made the proper precautionary landing in the water, there should have been no injury to the passengers. (R. Vol. 3, pp. 120-121).

PHI brought an expert witness, Walter Lamon, in from Connecticut to testify at trial. Lamon had previously performed evaluations of PHI's services while working for a customer of PHI, British Petroleum. (R. Vol. 4, pp. 201-202). Lamon admitted that he had never been trained on how to make emergency landings on water with the Bell Model 206 helicopter, the model involved in this incident. (R. Vol. 4, p. 207-208). Like Talley, Lamon was also a former military pilot. While admitting that after the bird was ingested, the helicopter was **no longer air-worthy**, Lamon commended Talley for continuing the flight to the platform at "South West 65 Bravo." Also, when questioned about whether Talley made a proper "precautionary landing" according to PHI regulations, Lamon admitted that the area Talley chose as his "precautionary landing" area was also Talley's final destination for that "sortie." (R. Vol. 4, pp. 219-220, 227).

LAW AND ARGUMENT

A Louisiana court of appeal may not set aside a trial court's findings of fact in the absence of "manifest error" or unless it is "clearly wrong". Where there is conflicting testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed, even though the appellate court may feel that its own evaluations and inferences are just as reasonable. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989), *on remand*, 558 So. 2d 1360, *writ denied*, 561 So. 2d 105.

Realizing the hopelessness in showing manifest error in the trial court's factual findings, PHI attempts to phrase its argument as an assignment of legal error. It argues that this Court should grant review to resolve the conflict that the Louisiana courts have created by failing to apply the sudden emergency doctrine; that a re-establishment of the applicable standard of care in emergency situations is warranted. This argument lacks merit.

It is obvious from the Louisiana courts' rulings in this matter that they did not reject the "sudden emergency" doctrine as PHI implies. The trial court's ruling and the decision of the Louisiana Fourth Circuit Court of Appeal were made with a full understanding and application of the "sudden emergency" doctrine. **What PHI is truly unhappy with is the way in which this rule of general maritime law was applied to the facts of the instant case. This is insufficient justification for this Court to grant PHI's writ request.**

Neither party disputes that the proper standard of care in this case is "reasonable care under the circumstances." This case involves the issue of whether the pilot exercised "reasonable care under the circumstances of an emergency." The trial court's decision reflects a fundamental understanding that the case involved an emergency, and that the pilot responded to the emergency negligently. The trial court well knew of the emergency circumstances, yet concluded that the pilot still breached the standard of care owing to his passengers. Indeed, the evidence shows that the pilot actually contributed to and compounded the emergency. PHI would have this Court believe that the "sudden emergency" doctrine is a cure all for any act of negligence committed once a dangerous situation is encountered. This is simply not the case.

There is no real conflict between Louisiana law and general maritime law in the "sudden emergency" doctrine. Louisiana law describes the "sudden emergency" doctrine thusly:

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances, or best means that may adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have

> been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

Hickman v. Southern Pacific Transport Co., 262 La. 102, 262 So. 2d 385, 389 (1972).

In comparison, under the general maritime law the "sudden peril" doctrine provides as follows:

> The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, **provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances**.

Employer Insurance of Wausau v. Sawanee River Spa, L. 866 F.2d 752, 773 (5th Cir. 1989), citing *Esso Standard Oil, S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967), *cert. denied*, 391 U.S. 914, 88 (S. Ct. 1808), 20 L. Ed. 2d 653 (1968). (Emphasis added).

Both Louisiana law and general maritime law qualify these doctrines in a manner which is particularly pertinent to the case at bar:

> The doctrine of sudden emergency does not involve a different standard of care than that applied in any other negligence case. **The conduct required is still that of a reasonable person under the circumstances. The emergency is merely a circumstance to be considered in assessing the actor's conduct**.

W. Prosser, *Law of Torts*, Chap. 5, S. 33 at pp. 167-170 (1971)

. . .

> Sudden emergency is certainly no absolute defense and we must still ask the question: was the conduct in question **unreasonable under the circumstances? At most, reference to "sudden emergency, serves to emphasize under the circumstances."**

Martin v. City of New Orleans, 678 F.2d 1321, 1325 (5th Cir. 1982), *rehearing and rehearing en banc denied*, citing *Dean v. Traveller's Insurance Co.*, 171 So. 2d 708, 709 (La. App. 1965). (Emphasis added).

Under the general maritime law:

> . . . this principle [of sudden emergency] must be qualified to the extent that it **does not exculpate all fault**, however flagrant [citations omitted], or obviate the duty of a ship's master to act with a level head [citation omitted]. [citation omitted]

Union Oil Co. of California v. Tug Mary Malloy, 414 F.2d 669, 674 (5th 1969). (Emphasis added).

In the case at bar, it is clear that the trial court took all circumstances into account, including the malfunctioning helicopter engine, in determining that PHI's pilot was negligent.

The trial court specifically found, and the evidence showed, that the PHI pilot was presented with three alternatives, one of them safe: (1) landing the helicopter in the calm waters; (2) returning to the nearby platform about a mile behind; (3)

"stretching" the flight out for the five mile flight to the far away platform. The evidence showed that the first alternative, the water landing, was the **safe and reasonable** alternative. Despite PHI's futile attempts to argue that a water landing was dangerous, after weighting all of the evidence and testimony, the trial court made a factual finding that a water landing soon after the ingestion of the bird "would have resulted in no injury" to Buras. (Petitioner's Appendix B, App. 41).

The trial court found the choice Talley made to have been **unreasonable** under the circumstances. In evaluating the actions that the pilot took, the trial court made the factual determination that the pilot's course of action was so egregious that it violated not only the high standard of care it found applicable to PHI as a common carrier, but also the ordinary standard of care that PHI argued was applicable to itself. (Petitioner's Appendix B, App. 43-45).

Moreover, the pilot was not even faced with a truly dangerous emergency until he chose to continue the flight, rather than making the immediate precautionary landing mandated by the PHI safety manual and FAA procedures. He violated both and decided to push forward with this "sortie" with all of the valor and heroism of a combat pilot, and attempted to land his helicopter on the platform at "Block 65 Bravo." The evidence showed that this alternative became more and more dangerous with each passing second. Literally, with the helicopter's last breath, Talley slammed it onto the platform.

In contrast, as explained by Hynes, immediately after the engine malfunction, Talley had the safe alternative of a soft landing in the waters of the Gulf. Both PHI company policy and FAA procedures required Talley to take this alternative. Furthermore, it was the safe alternative for which Talley had been trained, and one for which his helicopter was properly

equipped (with pop-out flotation devices). Nevertheless, Talley chose the riskiest alternative, one that was **unreasonable under the circumstances** as determined by the finder of fact. According to Mr. Hynes,

> . . . sometimes there is an old timer who's going to toughen it out, so to speak, and take the risk. . . . I don't think you measure how good an airman is by all the risks he takes.

(R. Vol. 3, p. 116).

The trial court rejected the reasons that Talley and the PHI expert gave for stretching the flight to make the platform and not making an immediate and safe precautionary landing. The trial court weighed the evidence and determined that Talley's justifications were irrational and motivated by economic concerns rather than by concerns for the safety of his passengers. Talley testified that landing in the Gulf could be a risky alternative because of the possibility of the helicopter capsizing; he also spoke of the possibility of injury occurring when the passengers were picked up by a boat in the Gulf. Notably, Talley was especially susceptible to these *de minimis* hazards because he was the only person in the helicopter not wearing a mandatory life vest. The trial court also saw Talley impeached with prior, inconsistent deposition testimony when he attempted to exaggerate these "risks" associated with a water landing. Talley noted that the passengers could have been scraped by barnacles. This statement, along with PHI's suggestion to the trial court that there was also a risk of shark attack, sharply contrasts with the high risks associated with Talley's actual behavior. By stretching out the flight, he risked total engine failure and, of course, a crash of a much greater magnitude than actually occurred when he slammed the helicopter onto the platform. Barnacle scrapes and the minuscule risk of shark bites pale by comparison to the severe injuries actually sustained by Mr. Buras.

The trial court made the following factual findings based upon the evidence and testimony:

> The pilot chose to continue the flight and attempt a landing on Block 65-B due to fears for his own safety involving a retrieval from water and out of a concern for the economic impact to his employer from putting the helicopter down in the water;
>
> Concern for the safety of his passengers played no part in the decision making process of the pilot in this matter; . . .

(Petitioner's Appendix B, App. 44).

The trial court continued with its findings of fact:

> The pilot owed a duty to his passengers to exercise a high degree of care for their safety. He failed to do so and chose a dangerous course of conduct which caused harm to one of his passengers rather than choosing a reasonable and alternative course of conduct which, in all probability, would have avoided injury to his passenger;
>
> Even if the pilot owed his passenger only an ordinary standard of care, his conduct violated that standard.

(Petitoner's Appendix B, App. 44-45).

PHI argued to the trial court that the pilot's actions were reasonable and viable options under the circumstances. The court found its arguments valid **only** if saving the helicopter was the primary consideration, and not if it was to ensure passenger safety. (Petitioner's Appendix B, App. 42-43).

PHI made the same arguments to the Court of Appeal that it makes in its writ application. The Court of Appeal specifically addressed PHI's arguments concerning the "sudden emergency" doctrine on pages 10-11 of its decision. It ultimately concluded that:

> Based on these facts, we cannot say that the trial court was manifestly erroneous when it determined that Mr. Talley's actions were not reasonable under the circumstances. The decision to continue flying, which was a reasonable one when the problem occurred over enemy territory in Viet Nam where there was no viable alternative, was **not reasonable** under the conditions existing in the Gulf of Mexico on September 20, 1988. The record supports the trial court's decision that PHI breached the standard of reasonable care under the circumstance that it owed to its passengers when its pilot elected not to make a precautionary landing in the water. We find, therefore, that the first and second errors assigned by PHI are without merit.

(Petitioner's Appendix A, App. 13-14). (Emphasis added).

In short, under the "sudden emergency" doctrine, Talley's conduct did not conform to the applicable standard of care. It was not a reasonable exercise of current standards of [pilot] knowledge and skill under the circumstances. *See Employers Insurance of Wausau*, 866 F.2d at 772. There was no "judgment call" as suggested by PHI. Hynes expressed his expert opinion in concluding that Talley had **one** safe choice and did not make it, even though Talley's training should have directed him toward that choice, and even though the rules in the PHI manual and the FAA procedures should have directed him toward that choice. Hynes clearly testified that Talley did not exercise sound

aeronautical decision-making. (R. Vol. 3, p. 116). In short, Talley's actions were cavalier and imprudent.

Although PHI may have provided expert testimony to the contrary, the decision to resolve the conflicting testimony in favor of Buras was a finding of fact made by the trial court and cannot be disturbed. PHI's argument is thus without merit.

CONCLUSION

Contrary to PHI's assertions, the "sudden emergency" doctrine does not serve to automatically exculpate a pilot from all responsibility for negligent and unreasonable actions simply because an emergency situation is encountered. The emergency is merely a circumstance to be considered in assessing the pilot's conduct. This is exactly what was done by the trial court and the Louisiana Fourth Circuit Court of Appeal.

PHI attempts to divert this honorable Court's attention from the real facts of this case and from the trial court's well reasoned factual findings and inferences. The trial court saw and heard contradictory evidence and decided the facts pertinent to the instant matter in Buras' favor. The trial court simply saw a plaintiff whose life was destroyed by a reckless pilot. Those are the **real facts** of this case. PHI emphatically dislikes the trial court's findings and its decision based upon these facts. However, this dislike obviously does not warrant this Court granting a writ of certiorari.

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In The

Supreme Court of the United States

October Term, 1997

PETROLEUM HELICOPTERS, INC.,

Petitioner,

v.

MITCHEL BURAS,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The petition in this case presents a single issue of law: Did the courts of Louisiana erroneously fail to apply the rule of general maritime law applicable to emergency situations in holding Petroleum Helicopters, Inc. ("PHI") liable for respondent Mitchel Buras's injuries? As shown in the petition for certiorari (Pet. 10-15), a reasonable decision made by a pilot in responding to an emergency is not negligence even though another response to the emergency might have been preferable.

1. Significantly, respondent does not dispute PHI's contention that the federal law on responding to emergencies prescribes the standard of care that the trial court *should* have applied in this case. Indeed, Mr. Buras goes so far as to assert that the trial court did apply this standard: "The trial court's ruling and the decision of the Louisiana Fourth Circuit Court of Appeal were made with a full understanding and application of the 'sudden emergency' doctrine." (Opp. 8.) This assertion, however, is belied by the trial court's opinion.

The trial court does not mention – much less apply – the federal law on responding to emergencies. To the contrary, the trial court applied a "duty-risk analysis" that took no account of the fact that the pilot was responding to an emergency. (Pet. App. 37.) According to trial court, the "burden of prevention [of injury to the passengers] . . . is the pivot upon which the issue to be decided . . . turns." (Pet. App. 38.) As a result, the trial court's liability determination turned on its conclusion that "the water landing was a reasonable means of preventing this accident." (Pet. App. 41.) Nowhere in the

trial court's opinion is there any recognition of the federal rule that "the judgment of a competent sailor [or pilot] *in extremis* cannot be impugned." *The Oregon*, 158 U.S. 186, 204 (1895).

2. Respondent Buras recites in much detail the evidence that he claims supports the determination of liability. Although much of that evidence was in dispute at trial,[1] it is for present purposes irrelevant. There is no claim that the trial court's failure to apply the correct standard of care in determining liability was "harmless error." Nor could there be. Only one judge in the Louisiana courts examined the record in this case under the correct standard of care – Judge Plotkin in his dissenting opinion in the Louisiana Court of Appeal. He correctly concluded: "The record evidence in the instant case, taken as a whole, indicates that Talley's decision to continue flying the helicopter to the platform was reasonable under the circumstances." (Pet. App. 25.)

3. In light of the position taken by respondent in his brief in opposition, there is no dispute as to the applicable federal standard of care. Because the trial court and

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[1] Respondent argues, without citation to the record, that ditching the aircraft in the Gulf of Mexico was "mandated by the PHI safety manual and FAA procedures." (Opp. 11.) That claim was hotly disputed at trial. PHI's evidence was neither its manual nor FAA requirements imposed such a Procrustean requirement on the pilot (R., Vol. 4, pp. 116-17, 186, 189.). In that regard, the trial court's assertion that PHI had been cited by the FAA for not ditching the aircraft (Pet. App. 41-42) was clearly erroneous. The testimony at trial was that PHI had only been cited once by the FAA in 40 years and that was for inadequate paperwork on a flight manifest (R., Vol. 4, p. 153).

the court of appeal failed to employ the correct standard of care, petitioner requests that this Court grant the Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons and those set out in the petition for certiorari, petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

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